SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 23

JOHNSON OIL REFINING COMPANY, APPELLANT,

vs.

THE STATE OF OKLAHOMA EX REL. C. E. MITCHELL, COUNTY ATTORNEY OF PAWNEE COUNTY, OKLAHOMA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

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the situs of said property was established by such evidence to be in Pawnee County, Oklahoma, and not elsewhere, and to which ruling said Johnson Oil Refining Company excepted.

4. The court erred in refusing to sustain the objection of Johnson Oil Refining Company to the proposed assessment of its cars as a taking of its property without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States.

5. The court erred in not holding and deciding that the property assessed was taxable only at the domicile of its owner.

6. The judgment of the County Court of Pawnee County is not supoorted by the evidence, which wholly fails to show that the cars of the Johnson Oil Refining Company, or any of said cars, were located and had an actual situs, in Pawnee County on January 1st, 1928.

7. The conclusion and judgment of the court that the tank cars of the Johnson Oil Refining Company were subject to [fol. 3] taxation in the State of Oklahoma, is contrary to law, in that said cars were, as shown by the evidence, property beyond the territorial jurisdiction of the State, and that such judgment, assessment and taxation constitutes a taking of the property of Johnson Oil Refining Company without due process of law, hence in violation of the Fourteenth Amendment to the Constitution of the United States.

8. The judgment of the Court is contrary to the undisputed evidence, which established that the cars assessed were the property of a non-resident corporation, domiciled in the State of Illinois, used and employed by it in the transportation of merchandise in interstate commerce, and in the course of its marketing business conducted by, and from, its office in the State of Illinois, and were only temporarily in Pawnee County, and in the State of Oklahoma, on such business, and had no abiding place therein.

9. The judgment of the Court is contrary to law because the proof showed that the cars assessed for taxation were only temporarily in the State of Oklahoma, and upon interstate business, there being no statute of the State fixing a situs for such cars, or any portion thereof, in Pawnee County or in said state.

10. The court erred in the construction of the statute of Oklahoma providing for taxation of all real and personal property in the State, and in holding and adjudging that the cars of Johnson Oil Refining Company were property in the State of Oklahoma within the meaning of said stat-
[fol. 4] ute, which said construction of the statute would render the same unconstitutional in that it would impute to the Legislature an intent to tax a non-resident's property outside the jurisdiction of the State, and in disobedience to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

11. The judgment of the court is contrary to law, as neither the State of Oklahoma, as such, nor any of its political subdivisions or taxing districts, has the power or authority to tax the cars of Johnson Oil Refining Company, or any of them, and which cars were shown by the evidence to be only temporarily in the State, and for a purpose wholly inconsistent with an indefinite stay therein, to-wit, for receiving an interstate load of refinery products, remaining in said state for such purpose not more than twenty-four hours at a time, and coming into the state approximately only eighteen times, or eighteen days, in the course of one year, and consequently were constantly out of the state for the remaining 347 days of the year, and the imposition of such tax is therefore without authority of law, and amounts to the taking of the property of Johnson Oil Refining Company without due process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States.

12. The court erred in overruling the motion of Johnson Oil Refining Company for a new trial, and in refusing to grant it a new trial upon the grounds therein set forth.

[fol. 5] Wherefore Johnson Oil Refining Company prays that said judgment be reversed, and that it be restored to all things it has lost by reason thereof.

Charles Y. Freeman, McCollum & McCollum, West, Gibson, Sherman, Davidson & Hull, Attorneys for Johnson Oil Refining Company.

[fols. 6 & 7] EXHIBIT "A"

IN COUNTY COURT OF PAWNEE COUNTY

No. 1805

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of JOHNSON OIL REFINING COMPANY

Case-made—Filed Dec. 19, 1931; filed in Supreme Court Dec. 24, 1931

[File endorsements omitted.]

[fol. 8] Be it remembered that heretofore certain proceedings were had before the County Treasurer of Pawnee County, Oklahoma, a transcript of which proceedings is in words and figures as follows, to-wit:

[fol. 9] Transcript of Proceedings Before the County Treasurer of Pawnee County, Oklahoma in the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of Johnson Oil Refining Company

NOTICE OF PROPOSED ASSESSMENT

Office of the County Treasurer of Pawnee County, Oklahoma

Dated March 13th, 1930.

To Johnson Oil Refining Company, Cleveland, Oklahoma:

You are hereby notified that information has been filed by the tax ferret of said county with me as county treasurer of said county, that you were the owner of property which had a taxable situs in said county, of the description, and of the fair cash value, and for the tax years, as is more particularly stated in the notice to me, a copy of which is hereto attached for your information and as part hereof, which property it is declared has been omitted from assessment and taxation in said county.

The law required me to give you this notice by registered mail, and I have fixed the 8th day of April, 1930, at the hour of ten o'clock A. M., as the time and place at or

before which you may file written objections to said proposed assessment; at said time and place, or as soon there-
[fols. 10–17] after as may be convenient said matter will be given due legal consideration.

If no written objections be filed by you at or before said time fixed, it will be assumed that said proposed assessment is agreeable to you, and said proposed assessment will be made against you in accordance with said notice to me.

Respectfully, Chas. P. Livesay, as County Treasurer of said County.

P. S.—Any discussion of said matter, before hearing at the time and place above mentioned, with a view to amicable adjustment, should be had with the tax ferret. If and when such adjustments are reported to me, I will give them due consideration. I have no office to perform in this matter except to give it proper and judicial consideration in the proper way. No discussion of the matter with the ferret will excuse your filing written objections, if you do object. All payments on assessments should be made at my office to me or my deputies.

—— ——, County Treasurer.

[fol. 18] Before County Treasurer of Pawnee County, Oklahoma

No. —

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of Johnson Oil Refining Company

Objections to Proposed Assessment—Filed April 8, 1930

The undersigned, Johnson Oil Refining Company, in response to the notice directed to it by the Treasurer of Pawnee County, Oklahoma, objects to the proposed assessment of its property for the years specified in said notice for the following reasons:

I

Because neither the tax ferret nor the County Treasurer of Pawnee County discovered that the said Johnson Oil Refining Company had omitted to list for taxation the property mentioned.

II

Because Johnson Oil Refining Company is a foreign corporation, incorporated under the laws of the State of Illinois, and domiciled in that state, and is engaged in inter-state commerce and the property so proposed to be assessed is used in inter-state commerce and is taxable at the domicile of said Johnson Oil Refining Company, or under the laws of the state wherever it may be used or located at the tax paying period.

III

Because the property proposed to be assessed was not domiciled in the State of Oklahoma and had no taxable situs in Pawnee County at the time mentioned in said notice.

[fol. 19]

IV

Because said cars are not of the value upon which the assessment is proposed to be made.

Wherefore Johnson Oil Refining Company prays that its objections be considered and that such proposed assessment be disallowed and denied and that proceedings herein be dismissed.

Johnson Oil Refining Company, by West, Gibson, Sherman, Davidson & Hull, Its Attorneys.

[fols. 20–32] Before County Treasurer of Pawnee County, Oklahoma

No.—

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of Johnson Oil Refining Company

Order of County Treasurer—Filed May 8, 1930

The above entitled cause came on to be heard by the County Treasurer of Pawnee County on this the 8th day of May, 1930, upon the notice of the proposed assessment

against Johnson Oil Refining Company and its objections thereto. And the treasurer having heard the same:

It is ordered, considered, and adjudged by the County Treasurer that the said Johnson Oil Refining Company is a foreign corporation doing business in Oklahoma, and that on the 1st day of January, 1928, it had property in Pawnee County which was taxable therein and which was omitted from taxation, and that said property was of the fair cash value of Two Hundred Sixty-seven Thousand, Four Hundred ($267,400.00) Dollars.

It is therefore ordered that there be spread upon the tax rolls of Pawnee County, against said Johnson Oil Refining Company an assessment for and as of January 1, 1928, in the said sum of $266,700.00 to which order said Johnson Oil Refining Company objects and excepts and gives notice of its intention to appeal therefrom to the County Court of Pawnee County.

(Signed) Chas. P. Livesay, County Treasurer of Pawnee County, Oklahoma.

[fol. 33] In County Court of Pawnee County

No. 1805

In the Matter of Assessment Against Johnson Oil Refining Company, Cleveland, Oklahoma, of Alleged Omitted Property for the Year, 1928

Order Continuing Cause—Oct. 15, 1931

And now on this 15th day of October, 1931, cause continued to November 9, 1931, at 9 o'clock A. M. Attorneys for the State are the County Attorney and R. K. Robertson. For the defense are McCollum and McCollum of Pawnee, Oklahoma, and West, Gibson, Sherman, Davidson & Hull of Tulsa, Oklahoma.

[fol. 34] In County Court of Pawnee County

Statement of Evidence

Be it further remembered that thereafter, to-wit, on the 9th of November, 1931, said cause coming on for trial in

said County Court, at which time there appeared for Pawnee County, C. E. Mitchell, County Attorney of Pawnee County, Ed Waite Clark and R. K. Robertson, special counsel, and for Johnson Oil Refining Company, McCollum & McCollum and West, Gibson, Sherman, Davidson & Hull, and, both parties announcing ready for trial, the following proceedings were had, to-wit:

It was stipulated that, for the purposes of trial, this cause and cause No. 1741 might be heard together and upon the same evidence as they involve the same questions, and that separate judgments should be rendered in each case upon the evidence and which should be considered the evidence in each case.

STATEMENT OF COUNSEL

By the Court: Make your statements.

Mr. Davidson: The position of Johnson Oil Refining Company in its opposition to the proposed assessment, and the facts upon which it is based, can be briefly stated.

The Company, prior to March of this year, was an Illinois corporation, domiciled in that state and with its principal office in Chicago. For many years it has been engaged in the marketing and sale of refinery products. That business is interstate in its character, in that it sells and transports such products to consignees in many different states. Its tank cars have always been employed in that business, and were so employed long before it owned a refinery. The refinery at Cleveland was purchased late in 1922 to supply [fol. 35] merchandise for its marketing business, and since that time its cars have been in constant use in the business, substantially all of them being used in transporting the products of the refinery to points outside of Oklahoma, although not exclusively so, as the cars are also used to transport refinery products purchased from other refineries. But these cars are not necessary to the operation of the plant; they are not a part of the plant, nor a plant facility. If a facility at all, they are a facility of the company's marketing business.

The cars are loaded at the refinery upon the company's private tracks, and which operation takes about twenty-four hours. When unloaded at the destination in some other state they are dead-headed back to the refinery at

Cleveland for another load, unless diverted to some other destination. The interstate trip takes about twenty days on an average, so that no individual car is in Oklahoma, or in Pawnee County longer than about eighteen days in all, out of any year.

The company pays taxes on its refinery and its equipment in Pawnee County, where it is located. It also pays taxes on these cars and other property in Illinois, under the capital stock tax of that state, receiving credit for taxes paid elsewhere.

We are not objecting to an assessment of the cars merely because they are used in interstate commerce, for we do not contend that that necessarily exempts them from taxation, but upon the ground that the cars are not property within the state of Oklahoma; that they have no taxable situs in the state, either in fact, or by virtue of any legislative enactment, and that to tax them as proposed, or any number of them, would be to deprive Johnson Oil Refining Company of its property without compensation, and amount to a taking of its property without due process of law, and in violation [fol. 36] of the Fourteenth Amendment to the Constitution of the United States.

Stipulation as to Certain Facts

It is stipulated by the Johnson Oil Refining Company, and the State of Oklahoma, that the tank cars listed in the tax ferret's notice to the treasurer in the above styled causes were not specifically listed for assessment and taxation on an ad valorem basis in Pawnee County, Oklahoma, for the years as set out in said notices, 1920 to 1928 inclusive.

It is further stipulated that the Johnson Oil Refining Company's refinery and its equipment was assessed and taxed for the years 1923, to 1928, inclusive, as set out in the list and that tank cars were not included in the list.

It is further stipulated that the refinery referred to is situated in Pawnee County, Oklahoma, and it is further stipulated that Johnson Oil Refining Company was during all the years mentioned a foreign corporation and had its domicile in Illinois.

And thereupon the following testimony was introduced on behalf of the State of Oklahoma:

The Court: Call your first witness:

G. C. LILLY, called as a witness on behalf of the State, having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined in chief by Ed Waite Clark and testified as follows:

[fol. 37] Direct examination.

By Mr. Clark:

Q. State your name.
A. G. C. Lilly.
Q. Where do you live?
A. 200 Wood Court, Wilmette, Illinois.
Q. That is a suburb of Chicago, Illinois?
A. Yes, sir.
Q. What is your business, Mr. Lilly?
A. I am employed by the Johnson Oil Refining Company, Secretary and Treasurer.
Q. Where does the refinery company have its office, general office?
A. 178 West Adams Street, Chicago, Illinois.
Q. Are you employed in that office?
A. Accounting department.
Q. Is that a foreign corporation?
A. Yes, sir.
Q. Licensed to do business in Oklahoma?
A. Yes, sir.
Q. Mr. Lilly, do you know, does the Johnson Oil Refining Company own any tank cars?
A. Yes, sir.
Q. Do you know how many?
A. At the present time, three hundred eighty-six.
Q. Do you know how many the Johnson Oil Refining Company owned on the first of January, nineteen hundred twenty-eight?
[fol. 38] A. I can't give you the exact number without referring to records, but the number hasn't varied very much in several years.
Q. The number hasn't varied much in several years?
A. No.

Q. Do you have the records with you showing how many tank cars they owned?

A. No, I have not.

Q. When would you say the Johnson Oil Refining Company bought these cars?

A. The first twenty cars we owned were purchased in 1918. We acquired seventy more cars with the purchase of this plant in 1922, and immediately thereafter, bought the remainder of this fleet of cars.

Q. So from that time on, it would be about three hundred eighty cars that the Johnson Oil Refinery owned?

A. About.

Q. Mr. Lilly, for what were these cars used?

A. For the transportation of their refinery products, gasoline, kerosene, from Cleveland, Oklahoma, and elsewhere for marketing purposes, to Iowa, Illinois and Missouri, and other states.

Q. And from where else?

A. From the plant of any manufacturer from whom we bought.

Q. You purchased other products than what you produced?

A. Yes, sir.

Q. You own the refinery at Cleveland?

A. Yes, sir.

Q. And is Cleveland the chief shipping point for that refinery?

A. Yes, sir.

Q. Do you know whether these cars have marked on them: "When empty return to Cleveland, Oklahoma"?

[fol. 39] A. I don't know that they are, at one time I believe they had the name "Cleveland, Oklahoma," stenciled on them.

Q. Now then I have here Railroad Guide, Equipment Guide, for January, 1928. Under the Johnson Oil Refining Company it has this statement: "Send movements and mileage to V. C. Goward, Superintendent Transportation, Cleveland, Oklahoma," and, also the statement: "Send bills for repairs to cars and make remittances to the Johnson Oil Refining Company, Cleveland, Oklahoma." Do you know whether your company authorized those two statements?

A. I do not.

Q. As a matter of fact, is it true that those are the orders?

A. Except as to the remittances. I don't think ever authorized anyone to send remittances to Cleveland, Oklahoma.

Q. But you did for mileage, etc.?

A. Yes, sir.

Q. How much trackage does the Johnson Oil Refining Company own in Chicago?

A. None.

Q. Do they own trackage in Cleveland?

A. Yes, sir.

Q. When the Johnson Oil Refining cars are unloaded and empty, is it not a fact that they are returned to Cleveland, Oklahoma?

A. Yes, sir, it is.

Q. All of them, unless there are special orders?

A. Yes, sir.

Q. Do you know, Mr. Lilly, the amount of trackage that the Johnson Oil Company has in Cleveland?

[fol. 40] A. I think we have sixty-seven spots there.

Q. That is room for sixty-seven cars on your trackage there?

A. Yes, sir.

Q. Does your company own any other refinery besides the one located at Cleveland, Oklahoma?

A. No.

Q. Is it a fact that all of the cars owned by the Johnson Refining Company come into Pawnee County sometime during the year?

Mr. Davidson: You mean all or each one?

Mr. Clark: Each one.

A. Yes, sir, I am sure they do.

Mr. Clark: I believe that is all.

Cross-examination.

By Mr. Davidson:

Q. How long do these stay at Cleveland?

A. Average of twenty-four hours per car.

Q. Then where do they go?

A. To whatever destination they are loaded for, in other states principally.

Q. Can you tell, Mr. Lilly, how long it takes on an average, for a car to make a trip, a round trip?

A. I think we have about one and a half car loadings per month. Twenty days per car.

Q. Twenty days to the car?

A. Yes, sir.

Q. You mean that the car is outside of Oklahoma twenty [fol. 41] days out of the month and that it is in Pawnee County about twenty-four hours of the time?

A. Yes.

Mr. Davidson: That is all.—I don't know that I put my question right. It takes a car about twenty days to make a round trip?

A. Yes.

Q. And a car is in Oklahoma then about one and a half times a month?

A. Yes, sir.

Q. That would make it thirty-six hours out of the month that any particular car is in the County?

A. Yes, sir.

Mr. Davidson: That is all.

Redirect examination.

By Mr. Clark:

Q. As I understand it, they load these cars at Cleveland and send them out and when they are empty, they ship them back to Cleveland?

A. Yes, sir.

By Mr. Rowe:

Q. In other words, when a car reaches a point of destination after it is delivered of its products, then it is returned to Cleveland?

A. Yes, sir, unless diverted. If material is purchased from other refineries.

Q. Then it is diverted?

A. No, it would go out with a bill of lading.

[fols. 42–44] Q. Otherwise it would return to Cleveland?

A. Yes, sir.

Mr. Rowe: That is all.

Mr. Clark: That is all.

Mr. Davidson: That is all.

[fol. 45] G. C. LILLY (recalled).

By Mr. Clark:

Q. You are the same Mr. Lilly that testified here awhile ago?

A. Yes, sir.

Q. Mr. Lilly do you know whether the Johnson Oil Refining Company ever paid to the State a tax on these cars prior to the Travis vs. Dickey case in which the cars would not come under the Public Carrier's Statute?

A. I cannot answer, I do not know anything about the Travis vs. Dickey case.

Q. Well, do you know whether the Johnson Oil Refining [fols. 46–48] Company ever paid any taxes in the State of Oklahoma under the Public Carrier's Statute?

A. Yes, sir.

Q. And how long did they pay that tax?

A. I think for four or five years.

Q. And when was the last time they paid that?

A. I am unable to say definitely without having opportunity to examine records, but it was the year prior to the year these cases were started. That was the last time we paid this tax to the State of Oklahoma.

Q. And since then you have not paid the State of Oklahoma any tax?

A. No.

Mr. Clark: That is all.

[fol. 49] G. B. STALLARD

Direct examination.

Mr. Clarke:

Q. State your name.

A. G. B. Stallard.

Q. Where do you reside?

A. Parsons, Kansas.

Q. Are you employed by the M-K-T Railroad Company?

A. Yes.

Q. In what capacity?

A. As chief Per Diem Clerk.

Q. That is in the Car Accounting Department?

A. Yes.

Q. What are your duties, Mr. Stallard, as to keeping the record of the cars?

A. Supervision.

Q. Do you have under your supervision record of the cars of the Johnson Oil Refining Company which are shipped on your railroad?

A. Yes.

Q. For what years?

A. We have now 1925 to date.

Q. That is, 1925 to 1929, inclusive?

A. Yes.

Q. Have you from these records compiled a statement as to the average number of cars belonging to the Johnson Oil Refining Company handled in Pawnee County, Oklahoma, [fol. 50] from 1925 to 1929 inclusive?

A. The statement was compiled under my direct supervision.

Q. Do you know that the statement is correct?

A. Yes.

Q. What was the average number of cars handled in Pawnee County during those years? The purpose of the question is to advise the Court of the average number of cars handled in Pawnee County in the event it should be decided to be the basis of taxation.

Objection.

Mr. Davidson: To which question the Johnson Oil Refining Company objects on the grounds that the question is incompetent, irrelevant and immaterial, and there is no power in Pawnee County to tax the cars on such basis.

The Court: Overruled.

Mr. Davidson: Exception.

A. During the year 1925 there was an average of 58.6 cars handled in Pawnee County; in 1926, 50.3; in 1927, 54.4; in 1928, 57.6; and in 1929, 66.7 cars.

Q. Mr. Stallard, how did you arrive at those figures as to the average?

A. By taking an inventory on different dates during the month and striking an average of the number of cars.

Q. Do you have under your supervision books which

show the location of the various cars on your line on each day of each month?

A. I have.

Q. You arrived at this average through tabulation of the cars of the Johnson Oil Refining Company in Pawnee [fol. 51] County on each of the respective days of the year as shown by those records? Is that correct?

A. Not each day; on certain dates.

Q. What dates did you use?

A. The 1st and 15th of each month.

Q. Then, as I understand it, Mr. Stallard, you arrived at this average by taking the number of Johnson Oil Refining Company cars in Pawnee County on the 1st and 15th of each month during the year?

A. Yes.

Q. Is that the basis of computation customarily used by the Railway Companies in determining the location of their cars?

A. Yes.

Q. And it is considered accurate?

A. Yes.

[fol. 52] Cross-examination.

By Mr. Davidson:

Q. These cars to which you have referred are cars which your records show reached Pawnee County?

A. Yes.

Q. Do you know whether these cars had been delivered to the Johnson Oil Refining Company at the refinery?

A. I did not.

Q. You don't know whether the cars, then, were on the Katy track in possession or control of the Katy or whether they had been delivered across the switch to the private [fols. 53–56] tracks of the Johnson Oil Refining Company?

A. I do not.

Redirect:

Q. Your records show that the cars had been returned to Cleveland, Oklahoma?

A. To Cleveland, yes.

[fol. 57] G. C. LILLY, being recalled, in open court deposes and says:

Direct examination.

By Mr. Clark:

Q. You are the same Mr. Lilly that testified here awhile ago?

A. I am.

Q. Mr. Lilly did you send in a statement purported to be a Return of Personal Property of Johnson Oil Refining Company, Pawnee County, Oklahoma, as of January 1, 1931?

A. Yes, I signed it and sent it in.

Q. And did you list in that assessment some tank cars?

A. Yes, sir.

Q. Are these tank cars a part of the fleet that this case involves?

A. Yes, sir.

Q. What did you list them at?

A. Five Hundred Dollars each.

Q. Now is a part of your work to make out assessments for the Johnson Oil Refining Company?

A. Yes, sir.

Q. Mr. Lilly, during the years that you have testified [fol. 58] that the Johnson Oil Refining Company owned this fleet of cars, what is the value of these cars, do they depreciate in value?

A. I think they have been depreciating in value ever since we have owned them.

Mr. Clark: That is all.

Cross-examination.

By Mr. Davidson:

Q. Mr. Lilly, on whose advice did you make that return?

A. Mr. C. E. Dacies, Assessor of Pawnee County, Oklahoma.

Q. Isn't it a fact that you had been advised that a compromise and settlement of all these tax ferret cases had been suggested and was agreeable to the County Officers, but had

not been consented to by the tax ferret, and that you were advised in order to show your good faith and good faith of the company in suggesting a compromise that you made this return, and that was the sole purpose and object of making the return?

Mr. Clark: We object to that as incompetent, irrelevant and immaterial as to what he was advised and who advised, and not binding on this case.

The Court: You gave that valuation and swore to it, didn't you?

A. Yes, sir.

Q. Was it not your information that a part of that settlement of Five Hundred Dollars was for all these years?

Mr. Clark: We object to that as incompetent, irrelevant [fol. 59] and immaterial.

By Mr. McCollum:

Q. It isn't so much the value but the fact that they are listed at all, brought out by this negotiation.

A. I swore that was the value in the return suggested to me by the County Assessor.

By Mr. Davidson:

Q. Do you know the value?

A. No.

Mr. Clark: We offer this in evidence. (To stenographer: "Mark this 'State's Exhibit A' in both cases.")

Mr. McCollum: We want to object to all this testimony relative to the listing of sixty-four cars in the 1931 return, or any other number of cars, and ask that all that testimony be stricken for the reason that it is incompetent, irrelevant and immaterial, and not binding on the company in this proceeding, not making this motion and not asking that the testimony exclusive of these cars be stricken.

The Court: Objection be sustained.

Mr. Clark: Exception.

By Mr. Clark:

Q. Mr. Lilly, handing you that which we have marked "State's Exhibit A", for the purpose of identification, is [fol. 60] that the statement that you made and signed?

A. Yes.

The Court: Any objection?

Mr. McCollum: We object to it as incompetent, irrelevant and immaterial, and particularly object to that part which pertains to the sixty-four cars.

The Court: The objection will be sustained as to the value based on the sixty-four cars.

(Which said Exhibit "A" so offered and admitted in evidence by the State is hereinafter set out in full at page —.)

Mr. Rowe: Object to that.

The Court: Overruled.

Mr. Rowe: Exception.

Mr. Clark: State rests.

(Witness excused.)

DEMURRER TO EVIDENCE

Mr. Davidson: Now, at the close of the evidence for the County, comes the Johnson Oil Refining Company and demurs to the evidence on the grounds that it is wholly insufficient under the law to sustain a judgment of this Court for the assessment and taxation by Pawnee County of these tank cars.

The Court: We will adjourn until nine o'clock in the morning. We cannot finish this argument tonight so we will adjourn until tomorrow morning at nine o'clock.

[fol. 61] And now — this time adjournment is taken until nine o'clock the following day, to-wit: November 10, 1931, at which time all parties being present in court, the following proceedings were had:

Arguments of counsel were heard by the Court at this time.

The Court: The demurrer is overruled.

Mr. Davidson: To which Johnson Oil Refining Company excepts.

And thereupon the State of Oklahoma having rested, the following testimony was introduced on behalf of the Johnson Oil Refining Company:

G. C. LILLY, called as a witness on behalf of the Johnson Oil Refining Company, having been first duly sworn to

testify to the truth, the whole truth, and nothing but the truth, was examined in chief by A. A. Davidson and testified as follows:

Direct examination.

By Mr. Davidson:

Q. You are the same Mr. Lilly who was on the stand yesterday?

A. I am.

Q. How long have you been connected with the Johnson Oil Refining Company?

A. I have been continuously with the company since August 16, 1916.

Q. How long have you been an officer in the Company?

A. I have been assistant secretary and treasurer and [fol. 62] Secretary and Treasurer during all that time.

Q. During all the period with which you were connected with it what was the business which you transacted?

A. Principally marketing petroleum products.

Q. The principal business of the company was marketing petroleum products?

A. Yes, sir.

Q. Where was the company's office?

A. Chicago, Illinois.

Q. Has it ever been anywhere else?

A. Until about the fall of 1920, the general office was at Chicago Heights, about 25 miles south of the loop of Chicago.

Q. But since that time, has been in Chicago?

A. Yes, sir.

Q. Up to March 14, this year, the company was an Illinois corporation?

A. That is right.

Q. Since then it has been re-organized as a Delaware corporation?

A. Yes, sir.

Q. But its office is in the same place as before?

A. Yes.

Q. Did the Johnson Oil Refining Company own tank cars for the marketing business prior to the time it bought the refinery at Cleveland, Oklahoma?

A. It did.

Q. Does the company still engage in the marketing business?

A. Yes, sir.

Q. You say that is its principal business?

A. Yes.

Q. When did the company buy the refinery at Cleveland?

[fol. 63] A. August, 1922.

Q. What was that purchased for?

A. Just for the manufacture of dependable, marketable products, for our marketing business.

Q. It is near production?

A. Yes.

Q. So that it furnishes a part of the merchandise that you market?

A. Yes, sir.

Q. Where is the marketing business of the company done?

A. Principally in Indiana, Illinois, Northwestern Ohio, Wisconsin, Missouri, Michigan, Nebraska and Iowa.

Q. You say principally those states, any sold in Oklahoma?

A. Yes.

Q. How much, what proportion, small or how?

A. Very, very small.

Q. Where are these contracts for the sale of refinery products made?

A. All contracts are made in Chicago, Illinois.

Q. And the sales are made in Chicago to consignees in these various states?

A. Yes.

Q. Now you stated yesterday that the cars in question were used for transporting gasoline and other refinery products, both your own as refined at Cleveland, and purchased from other refineries elsewhere. That is correct, is it?

A. That is correct.

Q. And except as to a very small portion, all the products here at Cleveland are carried out and sold in these various states where the company sells its products?

A. Yes.

[fol. 64] Q. From where are the movements of these cars directed?

A. Chicago, Illinois.

Q. That is from your office there?

A. Yes.

Q. I think you stated yesterday, at the time you bought the refinery, you bought some additional cars. Were these cars included in a part of the purchase of the refinery, or a separate purchase?

A. Purchased under a separate contract.

Q. Now, I think you stated yesterday, if not, I will ask you again, what these cars come to Cleveland for?

A. They come to Cleveland to be loaded with the products of this refinery.

Q. And how long does that take on an average?

A. Average of twenty-four hours.

Q. And when they are loaded, what becomes of the car?

A. They are shipped to the destination, to the customers.

Q. Immediately after they are loaded?

A. Yes.

Q. Is that the only purpose of their coming to Cleveland?

A. Yes.

Q. You stated yesterday that you had private tracks on the refinery premises for about sixty-three cars.

A. I think it is sixty-seven cars.

Q. Does the company own any private trackage anywhere else?

A. Yes.

Q. Where?

A. St. Louis, Missouri, Danville, Bloomington, Jacksonville, Springfield, Chicago Heights in Illinois, a trackage in Valparaiso, Indiana. There are probably many other [fol. 65] locations that I do not recall right now.

Q. The company's own private trackage?

A. Yes.

Q. Can you state, Mr. Lilly, about how many cars these various tracks provide for, tracks you own in different states, in total?

A. The trackage has never been measured. I have never seen an estimate of it. They vary from a capacity of three to four cars to I should say, ten to twelve cars.

Q. Would these various private tracks you own in different states in your judgment accommodate the whole fleet?

A. Approximately the whole of it.

Q. Approximately the whole of it?

A. Yes.

Q. Are these cars, Mr. Lilly, in any way necessary for the operation of the refinery at Cleveland?

A. No.

Q. I take it that you could ship refinery products in other cars than your own?

A. We could lease cars.

Q. Many marketers do, do they not?

A. We have done so.

Q. Now, Mr. Lilly, I wish you would tell the Court whether, during the years these cars have been used in the interstate marketing business, whether they have been taxed in any states in which they enter?

Mr. Clark: Object to that as incompetent, irrelevant and immaterial, and I want to tell the Court why. In the first [fol. 66] place, the court indicated that this Travis case indicated that where taxes had been paid at the domicile of the owner they might be entitled to refute a fixed situs at some place else. There is no such situation in this case. What this case says is this:

(Whereupon Mr. Clark reads the case to the Court.)

The Court: Sustained.

Mr. Davidson: Exception.

Q. I will ask you, Mr. Lilly, if these cars have been assessed for taxation outside of franchise license, in the states which they enter in the course of your marketing business?

Mr. Clark: To which the State objects as incompetent, irrelevant and immaterial for the reason that it gave awhile ago. It doesn't make any difference where or when, if they are here, they are taxable here.

The Court: Overruled.

Mr. Clark: Exception.

A. Yes.

Q. Has that been true with reference to the years you have been using these cars for interstate business?

A. Yes.

Q. Has this company paid these taxes from year to year?

A. Yes.

Mr. Clark: Object to that as incompetent, irrelevant and immaterial.

[fol. 67] The Court: Overruled.

Mr. Clark: Exception.

Q. Can you name the states in which these cars are being assessed for taxation as you have stated?

A. Missouri and Nebraska, Iowa. You are referring only to ad valorem tax?

Q. Yes.

A. Wisconsin, Illinois, Ohio, Michigan, Louisiana, Indiana, Georgia, West Virginia, may be others that I can't recall now.

The Court: Oklahoma?

A. Not an ad valorem in Oklahoma, no.

Q. Have you paid any taxes in Oklahoma relative to these cars?

Mr. Clark: Object to that as being improper form.

The Court: Objection sustained.

Mr. Davidson: Exception.

Q. Did you ever pay any taxes in Oklahoma on these cars?

The Court: Objection sustained.

Mr. Davidson: Exception, We offer to prove by the witness that Johnson Oil Refining paid taxes to the State of Oklahoma under the gross earnings Statute upon the demand of the State taxing authorities, to the State of Oklahoma.

Mr. Clark: We object to the introduction of such testimony as to any years other than those for which assess-

[fol. 68] ment is herein sought to be made on the grounds that it is incompetent, irrelevant and immaterial.

The Court: Objections sustained unless you state when. There are some other years, separate them, the year this tax was levied. Objection sustained.

Mr. Davidson: Exception.

Q. I will ask you to state, Mr. Lilly, if it isn't a fact that the State of Oklahoma through the State Tax Commission Collector is still demanding a return of these cars for taxation purposes under the Gross Earnings Statute?

Mr. Clark: We object to that as incompetent, irrelevant and immaterial, improper form and too indefinite for the Court to know whether it is incompetent.

Now, if the Court please, I will state if they still are, if it is for this year it doesn't make any difference.

The Court: Objection be sustained.

Mr. Davidson: Exception.

Q. Is it not a fact, Mr. Lilly, that they are demanding, that the State Tax Commission is demanding from you for each of the years since the companies stopped the payment of taxes under the State Gross Earnings Statute?

Mr. Clark: Object to that as incompetent, irrelevant and [fol. 69] immaterial.

The Court: Sustained.

Mr. Davidson: Exception.

Q. Now were these taxes that were assessed in the various states and paid to the States, on cars that went into those respective states?

A. No, not on any specific cars, the assessment was on cars that traveled through these states.

Mr. Clark: All questions in regard to taxes being levied is objected to by the State.

The Court: Overruled.

Mr. Clark: Exception.

Q. Do you know how long on an average these cars would remain on your private tracks in these different states?

A. One or two days.

Q. They were there for the purpose of being unloaded?

A. Yes.

Q. Now you say the cars also paid taxes in the States of Illinois?

A. Yes.

Q. What sort of a tax is that?

A. It is known as a capital stock tax.

Q. How does it work?

A. The entire property of the company every year in all states is deducted from the capital stock and surplus accounts and an assessment made on the balance, or difference.

Q. Now does this balance include tank cars that have not [fol. 70] been otherwise assessed?

A. Yes, sir, certainly.

Q. What kind of cars are these cars that the company owns?

A. Just ordinary steel shell tank cars.

Q. Are they insulated cars?

A. No, none of them.

Q. How old are they?

A. They were all second hand cars when we bought them. I don't think any of them have been manufactured since 1920.

Q. Has the company got a branch office at Cleveland?

A. Yes, sir.

Q. What is that office for?

A. For record purposes.

Q. Is any of the company's marketing business done at that office?

A. Yes, a small portion of it.

Q. As far as sales here are concerned?

A. Yes, sir.

Q. In Oklahoma?

A. Yes, sir.

Q. Have they anything to do with interstate marketing business?

A. No.

Q. Have they anything to do with the control of the cars?

A. No.

Q. Where do these cars get their repairs? Their main repairs?

A. Are made either by the railroad company on whose line the car broke down, or at some car shop that is equipped to do the kind of work necessary.

Q. Are there any particular machine or repair shops to which they are sent for repairs?

[fol. 71] A. So far as I know, we have never sent any cars to any but Coffeyville, Kansas, or Tulsa.

Q. Whose shops are they?

A. I do not know.

Q. Does the company maintain a repair shop any place else?

A. Just minor repairs made at Cleveland.

Q. No shop there?

A. No.

Q. You say the company owns no other refinery than that one at Cleveland?

A. That is right.

Q. Have you any plant of any kind at other places?

A. Yes, many of them, market plants, manufacture lubricating oil at Chicago Heights.

Q. Are these cars used for this also?

A. Yes.

Q. Now, your attention was called to a statement in the Railway Guide with reference to forwarding bills for repairs, I believe, to a Mr. Goward. Who is Mr. Goward?

A. Mr. Goward's title is "Superintendent of Transportation". His duties were merely clerical, to keep a record of these cars and to report to the Chicago office.

Q. Who was his superior?

A. The traffic manager.

Q. And where was his office?

A. Chicago, Illinois.

Q. You heard the deposition of the chief clerk of the car accountant's office of the Katy Railroad of Parsons, Kansas, with reference to his statement of the average number [fol. 72] of cars in Pawnee, the daily average number of cars in Pawnee County, did you not?

A. No, I did not hear that deposition.

Q. Well, I *will*, he testified that he estimated the daily average of cars in Pawnee County during the course of a year, by taking the number of cars on the first and fifteenth of each month and in that way arriving at a daily average of a year, stating that was the customary way among Railroads. Do you know of that system or custom among railroads?

A. I have heard of it.

Q. Do you know, can you state to the Court whether that rule custom or practice is with a view of accounting (to the Interstate Commerce Commission?),

A. I understand that it is not for accounting purposes, but for statistical purposes, for the analysis of the Railway Association.

Q. Have you personally, Mr. Lilly, made a calculation of the daily average of cars in Pawnee County during the years in question, Twenty-five, Twenty-six and Twenty-eight?

A. I made a calculation of such but I had assistance, it was made under my jurisdiction and under my direction.

Q. Now how did you do that?

A. We took the trackage, lists of cars at the refinery for each day in the year from January 1st, 1926, to December 31, 1930.

Q. The total number during the course of the year?

A. Counted the total number of cars for each day for a year.

Q. How did you make an average?

A. Divided the total by three hundred sixty-five.

Q. Can you tell what the average number was in 1925, 1926 and 1928, as a result of that calculation?

[fol. 73] A. I cannot tell you for '25 because the records were destroyed by a flood at the refinery.

Q. What were the other years?

A. 1926, 37 cars; 1927, 37 cars; in 1928, 42 cars; 1929, 55.

Q. In making the purchase of cars from time to time, where are those purchases made?

A. Contracts of purchase were made in Chicago.

Q. In every instance?

A. Yes.

Mr. Davidson: You may take the witness.

Mr. Clark: Comes now the State of Oklahoma and moves the Court to strike from the record all testimony concerning the payment of taxes during the years in question on the grounds that it is incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Clark: Exception.

Cross-examination.

By Mr. Clark:

Q. Mr. Lilly, you say some of the repairs are made at Cleveland?

A. Yes.

Q. They have on hand such material that the repairs would require?

A. Yes.

[fol. 74] Q. Does the Johnson Oil Refining Company make repairs at any other place?

A. No.

Q. And it doesn't carry in stock any repairs except at Cleveland?

A. No.

Q. Now in the matter of average number of cars that you just testified to, that is the average number where?

A. At the refinery at Cleveland.

Q. On the refinery's loading track?

A. Any cars that were on the tracks there, the loading, repair or M. K. & T. switch track.

Q. That includes the ones that were on the M. K. & T. switch tracks?

A. Yes.

Q. How much repair track have you there?

A. I can't say, I don't know the length of the track.

Q. Have you a sixty-three to sixty-seven loading track?

A. The loading track capacity is sixty-seven cars.

Q. And you don't know how much repair trackage?

A. No, I don't, but I judge it would hold twelve to fifteen cars.

Q. What would you judge that on?

A. Just having traveled by and having seen in a hundred times.

Q. You say you have an oil plant up in Illinois, a lubricating oil plant track in Illinois?

A. Yes.

Q. And you use your cars in connection with that?

A. Very infrequent. That is a compounding and barreling plant.

Q. What cars you use there you take off barrels from a gasoline distributing plant and use there?

[fol. 75] A. Yes, sir.

Q. These various trackages you own, for what purpose are they used?

A. For the accommodation of cars to be unloaded.

Q. There are no points to which cars are directed to be returned when empty, are there?

A. No, sir.

Q. As to this corporation tax, or capital stock tax, that you paid in Illinois, if you had paid taxes on an ad valorem basis on this fleet in Pawnee County for the years in controversy here, the State of Illinois would have allowed you to deduct that valuation in paying capital state tax?

A. Yes.

Mr. Clark: That is all.

By Mr. Rowe:

Q. Mr. Lilly, these cars that are going to different destinations and are unloaded, they are returned to Cleveland when empty, are they not?

A. The majority, that is, yes.

Q. You don't leave any of the empty cars in other states on other tracks, do you?

A. No.

Q. They are returned?

A. Yes.

Q. Mr. Davidson asked you with reference to the other trackage being sufficient to house all the cars, that would not be possible would it?

A. No.

Q. You don't have any one place sufficient to accommodate your whole fleet of cars?

[fol. 76] A. No, not any one place.

Q. But you do have more room at Cleveland?

A. Yes. The reason for that is in trying to supply a hundred and sixty-five stations from this state, a hundred and sixty-five places are all different localities.

Q. And they all return to Cleveland?

A. Yes, sir.

Q. On this question of the daily average, do you mean by daily average, that that was the number of cars that was in Cleveland as a daily average?

A. I mean that we took the inventory of cars in the refinery yards of the entire fleet from January 1st, 1930, to December 31, 1930, and added them all up and divided by three hundred sixty-five.

Q. And the other cars that were not there, where would they be, in transit or being unloaded at other places?

A. Yes, sir.

Q. Do you know how many cars the Osage trackage will hold?

A. No, I do not.

Mr. Davidson: Object to that as incompetent, irrelevant and immaterial.

The Court: Sustained unless it is their property.

Mr. Rowe: I will withdraw that.

Q. There is no other place or other track that the company has, except Cleveland, where you have empty cars return?

A. No.

Q. Just what was stamped or stenciled on these cars that [fol. 77] were sent to Cleveland, Oklahoma, in 1925 and including 1929?

A. During part of that time I think, all or nearly all, of these cars were stenciled: "Johnson Oil Refining Company, Cleveland, Oklahoma."

Q. The word "home" did not appear?

A. No.

Q. Did it at any time?

A. No, not to my knowledge.

Q. What did appear, as I understand it, is "Johnson Oil Refining Company, Cleveland, Oklahoma"?

A. That is right.

Q. Now when these cars were billed out to various points of destination do you know whether or not it was recited in the bill of lading, or other bills, "When empty return to Cleveland, Oklahoma"?

A. The billing on each tank car of oil is accompanied by a return billing for the convenience of the customer or station who unloaded that car, merely so that they can make no mistake about the route, about how the car should be returned.

Q. And on all of these cars it was specified: "To be returned to Cleveland, Oklahoma"?

A. Unless it was sent somewhere else, yes.

Q. This question might be competent. Mr. Lilly, in your computation attempting to show the daily average number of cars at Cleveland, did you take into consideration cars that might have been stored, or on the Osage tracks?

A. No.

Q. You didn't consider that in your computation?

[fol. 78] A. No.

Q. Is it not possible, and is it not a fact, that during the years in controversy, a number of cars were on the Osage tracks?

Mr. Davidson: Object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Davidson: Exception.

A. I don't know, probably they were. I never went over there to look at tank cars.

Q. You went over there just as much as you went to Cleveland to count those?

A. No.

Q. It is probably that they were?

A. Yes, probable.

Q. Highly probable?

A. Yes, sir.

Q. And of course, if they were, they were not considered in your computation?

A. No.

Q. And yet they were returned at the Cleveland plant?

A. If they were, they were counted at the Cleveland plant.

Mr. Rowe: That is all.

Redirect examination.

By Mr. Davidson:

Q. The company had made a return each year, hasn't it, since it has owned the refinery for taxation to the assessor of this County?

[fol. 79] A. Yes, sir.

Q. And has paid the taxes so assessed?

A. Yes, sir.

Q. Are these cars a plant facility?

A. We do not consider them so.

Q. Of what are they a facility?

A. Marketing business.

Q. The marketing business?

A. Yes, sir.

Q. Is any part of the investment made in these cars an investment in the refinery itself? In other words, is this a local investment or a general business investment in your marketing business?

A. Well, it is general investment in property for the use of the company, for the use of its business everywhere.

Q. You were asked whether you stored any of the cars on any of the tracks you own, private tracks that you owned in the different states. Have you ever had any occasion for any of the cars to be laid up for storage?

A. No, we have never stored any cars, they are always in use. In fact for several years our fleet has been insufficient. We have leased cars.

Q. I take it that if those cars were idle, the tracks were under your control and could be used for that purpose?

A. They could be used.

Q. You referred to a hundred and sixty-five marketing stations, what do you mean by that?

A. Stations where various petroleum products can be received in tank car loads and stored for sales.

[fol. 80] Q. And in what states are those stored?

A. Illinois, Indiana, Ohio, Wisconsin and Missouri.

Q. Now you were asked about the directions in the bill of lading. You stated those directions were for the information of your customers so that they would know where to send the cars when empty. That is correct is it?

A. Yes, sir.

Q. Did the words "Johnson Oil Refining Company, Cleveland, Oklahoma" stenciled on your cars serve that purpose?

A. No, I don't think so.

Q. Do you know why that was stenciled on the cars?

A. No.

Q. Did the fact that the words "Johnson Oil Refining Company, Cleveland, Oklahoma," were stenciled on the cars a direction for the return of the car to Cleveland, Oklahoma?

A. No.

Q. So that you put that in the bill of lading?

A. Yes.

Q. So, Mr. Lilly, if these cars ever became idle, hadn't any business to do, that you could take care of practically, approximately the whole fleet in your various tracks in various states?

A. I hesitate to say that we could take care of all of them but the majority of them, the bulk of them.

Q. You have never had occasion to do that anywhere?

A. No.

Q. Neither Cleveland nor any other place?

A. No.

Mr. Davidson: I believe that is all.

[fol. 81] The Court: May be you could answer some questions I would like to know about.

Q. How many cars did you pay ad valorem tax on in West Virginia in 1926, do you know?

A. No, I don't remember. I would have to have my records here before I could answer that question.

Q. And you don't remember how much you paid?

A. No.

Q. Now whatever you did pay in West Virginia in 1926, was that amount deducted from the value Illinois placed on them the same year?

A. Not the amount of tax was deducted, but the value of the assessment was.

Q. Would be just the same?

A. Yes, sir.

Q. Same with all those states you mentioned?

A. Yes.

Q. And you couldn't give me the amount of tax you paid in any of those states in any one year on an ad valorem basis on these cars?

A. Not from memory, but if I had an opportunity to see my records I certainly could do so.

Q. Were those taxes paid in those states all on an ad valorem basis?

A. So far as my experience with the taxation of tank cars, the tax in all other states except in Minnesota and Oklahoma, which is a gross earnings tax.

Q. This might be a legal question. Do you know whether [fol. 82] those states have a special statute upon those cars similar to the statutes of Colorado?

A. I don't know that. I do kno-, however, that if you don't return your cars for assessment in those states, if you don't pay your taxes, they will tie up a car for you if you don't pay them. The Johnson Oil Company has never had any cars tied up for nonpayment of taxes.

A. Did each of those states claim a situs in their jurisdiction for these cars on any amount of them for ad valorem taxes?

A. I don't know that, they claimed a situs there, but the Tax Commissioners of those states demand a return of the cars used in that state for taxes. We have a time or

two tried to protest those taxes, principally in Michigan, but never got anywhere with it.

Q. They claimed a return of those cars for taxation?

A. Yes, sir.

Q. And all the cars used in those states were taxed on an ad valorem basis?

A. All except Minnesota and Oklahoma.

Q. All except Minnesota and Oklahoma?

A. Yes.

Recross-examination.

By Mr. Clark:

Q. Mr. Lilly, considerable talk has been made here for ability to store cars in different states. Now, as a matter of fact, the reason you don't store cars there and the reason you don't send them there and do send them down here to Cleveland is because you have more use for them down here?

A. The reason we don't store them there is because we [fols. 83–94] always have use for them.

Q. The reason you send them to Cleveland is because you always have use for your cars, isn't it?

A. It is the one place where we always have use for petroleum cars.

Q. That could be why?

A. Yes, and nothing else.

Redirect examination.

By Mr. Davidson:

Q. If the cars were empty and needed storage it would be less expensive to store them on your own private tracks than to send them down here for storage?

A. Certainly.

Q. You wouldn't think of sending to Cleveland for storage?

A. No, haven't any storage for them.

Q. The only purpose of sending them to Cleveland is for transporting the refinery products?

A. Yes.

Recross-examination.

By Mr. Rowe:

Q. Then why do you have printed on the cars: "Cleveland, Oklahoma"?

A. It doesn't appear on the cars now, "Cleveland, Oklahoma," it was merely an advertising proposition and nothing more.

Mr. Rowe: That is all.

Mr. Davidson: That is all.

The Court: We will take about a five minutes' recess at this time.

[fol. 95] G. A. MINDEMAN, called as a witness on behalf of the Johnson Oil Refining Company, having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined in chief by A. A. Davidson and testified as follows:

Direct examination.

By Mr. Davidson:

Q. What is your name?

A. G. A. Mindeman.

Q. Are you connected with the Johnson Oil Refining Company?

A. Yes, sir.

Q. In what capacity?

A. Traffic man.

Q. Are you familiar with the trackage at Cleveland, Oklahoma?

A. Yes, sir.

Q. How much trackage have they there?

A. About sixty-seven spots as near as I can check.

Q. Is that trackage all on the premises of the company?

A. Yes, sir.

Q. Have you any storage trackage outside of that?

A. Not at Cleveland.

Q. Not at Cleveland?

A. No.

Q. Mr. Mindeman, when a loaded car is delivered to the Railroad company for transportation to its destination,

do you know how long it remains in the custody and control of the railroad company?

A. Until it is delivered at the spot of destination.

[fols. 96–106] Q. In returning cars with a bill of lading to Cleveland over the various lines how long does that possession and custody and control of the cars continue?

A. Until it's delivered to the destination at Cleveland.

Q. Do you know at whose risk it is held prior to that time?

A. Carrier's risk.

Q. Katy Railroad?

A. Yes, sir, Katy Railroad.

Mr. Davidson: That is all.

Mr. Clark: That is all. No questions.

Witness excused.

Mr. Davidson: We rest.

The Court: Anything in rebuttal?

Mr. Clark: We rest.

Whereupon the arguments to the court are made at this time.

The Court: Let the record show Judgment for Plaintiff as per J. E.

Mr. Davidson: We want the record to show that Johnson Oil Refining Company excepts to the judgment of the Court in each case.

Which was all the evidence offered or introduced at the trial of said cause.

[fol. 107] IN COUNTY COURT OF PAWNEE COUNTY

No. 1805

In the Matter of the Assessment Against JOHNSON OIL REFINING COMPANY of Alleged Omitted Property for the Year 1928

ORDER FOR JUDGMENT—Nov. 10, 1931

And now on this 10 day of November, 1931, Judgment for Plaintiff as per J. E.

[fol. 108] IN COUNTY COURT OF PAWNEE COUNTY, OKLAHOMA

No. 1805

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

MOTION OF JOHNSON OIL REFINING COMPANY TO SET ASIDE THE DECISION OF THE COURT AND TO GRANT IT A NEW TRIAL—Filed Nov. 12, 1931

Comes now Johnson Oil Refining Company and moves the Court to vacate and set aside its decision in the above entitled cause and to grant it a new trial, for the following reasons which materially affect the substantial rights of said Johnson Oil Refining Company:

1. Because the Court erred in overruling the demurrer of Johnson Oil Refining Company to the evidence introduced by the County of Pawnee and in holding, ruling and deciding upon said demurrer and that such evidence so offered and introduced established a definite situs of the [fol. 109] cars of said Johnson Oil Refining Company, and each of them, in said Pawnee County.

2. Because the Court erred in refusing to permit Johnson Oil Refining Company to prove that the State of Oklahoma, as such, and through its Tax Commission, was claiming and asserting the right of the State of Oklahoma to assess said cars for taxation under Section 9981 of the Compiled Oklahoma Statutes of 1921, and was demanding that said Johnson Oil Refining Company make return to it of its said tank cars for taxation under said statute for the benefit of the State of Oklahoma.

3. Because the Court erred in finding, concluding and deciding that all of the cars of Johnson Oil Refining Company were constructively in the State of Oklahoma and in Pawnee County, Oklahoma, at all times, within the meaning of the statute of Oklahoma providing for the taxation of personal property.

4. Because the decision and judgment of the Court is contrary to the evidence in this respect, to-wit, that the evidence established, without dispute, that the business in which the cars of Johnson Oil Refining Company were used

and employed was the marketing, sale and transportation by it, as a non-resident of Oklahoma, of refinery products outside of said State of Oklahoma and that none of said cars were in the said state, or in Pawnee County, except for the purpose of receiving a load of merchandise to be shipped out of the state and for no other purpose, and that said cars remained in said Pawnee County, and in said state, only long enough to receive said load, and that said cars were therefore in transit while within said State of Oklahoma.

5. Because the Court erred in holding, concluding and adjudging that the taxation of all of the cars of Johnson [fol. 110] Oil Refining Company, used and employed by it in its marketing business conducted by it at its domicile in the State of Illinois and in the transportation of refinery products outside of the State of Oklahoma, did not amount to a deprivation of its property without due process of law and was not in violation of the Fourteenth Amendment to the Constitution of the United States.

6. Because the decision and judgment of the Court is contrary to the evidence in this respect, to-wit, that the evidence establishes, without dispute, that only a small number of the cars of Johnson Oil Refining Company, not to exceed 57, on an average, were in Pawnee County and said State of Oklahoma at any one time during the said year 1928, and that no one car of the entire number owned, used and operated by said Johnson Oil Refining Company was in the State of Oklahoma oftener than eighteen times in the course of said year 1928, and at such times remained only long enough, not to exceed twenty-four hours at a time, to receive a load of refinery products for interstate shipment out of said State of Oklahoma, and the Court erred in holding, ruling and deciding that an assessment of taxes against all of said cars did not amount, as contended by Johnson Oil Refining Company, to a deprivation of its property without due process of law.

7. Because the Court erred in holding, ruling and deciding that the situs for taxation of the entire number of cars, owned, used and employed by Johnson Oil Refining Company was in Pawnee County, Oklahoma, at the location of its refinery in Cleveland, in said county, which said refinery supplied merchandise for shipment and sale by said

Johnson Oil Refining Company outside the State of Oklahoma, and in the course of its marketing business conducted and managed from its principal office in the state of its [fol. 111] domicile, the State of Illinois.

8. Because the Court erred in holding and deciding that the evidence introduced was legally sufficient to overcome the presumption that the situs of the cars owned, employed and used by Johnson Oil Refining Company in the conduct of its marketing business conducted by it in Illinois and various other stated, was at its domicile in the State of Illinois, and in holding and deciding that the evidence introduced established a definite and exclusive situs, for taxation of said cars, in Pawnee County, Oklahoma.

9. Because the Court erred in expressly holding and ruling that the consent of Johnson Oil Refining Company to a credit upon the assessment of its entire number of cars in the State of Illinois for taxes assessed and paid upon said cars in other states was an admission by it that the situs of said cars, for purposes of taxation, was not in the State of Illinois, as the domicile of said Johnson Oil Refining Company.

10. Because the decision and judgment of the Court was contrary to the evidence in this respect, to-wit, that the evidence establishes, without dispute, that only 48 cars were in Pawnee County on the first day of January, 1928, and erred in holding and deciding that the tax upon 333 cars, in addition to said number so in Pawnee County on January 1, 1928, did not constitute the taking of property of Johnson Oil Refining Company without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States.

11. Because the Court erred in holding, ruling and deciding that Pawnee County had the right to assess for taxation all of the cars of Johnson Oil Refining Company as a reciprocal duty for benefits conferred upon the entire number of cars as a unit.

[fol. 112] 12. Because the Court erred in holding, ruling and deciding that the direction of Johnson Oil Refining Company, in the bills of lading for cars of refinery products to consignees of said shipments in foreign states, to cause said cars, when empty, to be returned to Cleveland, Okla-

homa, established conclusively the intent of Johnson Oil Refining Company to fix the situs of each of said cars at Cleveland, Oklahoma, notwithstanding the uncontradicted evidence that the purpose of so directing their movements was to receive a load of refinery products for interstate shipment.

West, Gibson, Sherman, Davidson & Hull, McCollum & McCollum, Attorneys for Johnson Oil Refining Company.

[File endorsement omitted.]

[fol. 113] IN COUNTY COURT OF PAWNEE COUNTY, OKLAHOMA

No. 1805

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

JOURNAL ENTRY OF JUDGMENT—Filed Nov. 12, 1931

This cause came on to be heard by the Court, pursuant to assignment for trial by the Court, on the 9th day of November, 1931, and the trial thereof was concluded on the 10th day of November, 1931.

Upon consideration of the evidence, and the argument of counsel, and the Court being advised in the premises, found and concluded:

That the situs for taxation of the tank cars owned by Johnson Oil Refining Company, and used and employed in its business, was at its refinery situated in Pawnee County, to-wit, at Cleveland in said county, and that said Pawnee County had the right and authority to assess for taxation the entire number of said tank cars owned, operated and used by said Johnson Oil Refining Company.

[fol. 114] That the said tank cars of Johnson Oil Refining Company were omitted from taxation in said County of Pawnee for the year 1928.

That the County Treasurer of said Pawnee County was duly authorized and empowered to assess all of said cars for taxation for the year 1928 as property omitted from taxation for said year, to-wit, 380 cars.

That the fair cash value of said cars for said year 1928 was $190,500.00.

It was therefore considered, ordered and adjudged by the Court that there be entered and spread on the assessment roll of said Pawnee County an assessment against said Johnson Oil Refining Company, in respect to said tank cars, in the sum of $190,500.00, and that a tax be extended on the tax rolls of said county for the year 1928 in accordance with said assessment, as provided by law, to which findings, conclusions and judgment of the Court Johnson Oil Refining Company at the time excepted.

And now on this 12th day of November, 1931, the motion of said Johnson Oil Refining Company to set aside the decision of the Court and to grant it a new trial came on to be heard by the Court, and upon consideration thereof, and being duly advised in the premises:

It is ordered that said motion for new trial be and the same is hereby overruled, and to which ruling and judgment of the Court Johnson Oil Refining Company excepts, and gives notice in open court of its intention to appeal from the judgment of the Court to the Supreme Court of Oklahoma, and requests the Clerk of said Court to note said notice of appeal on the proper docket, and which is done accordingly.

And for good cause shown, Johnson Oil Refining Com-
[fol. 115] pany is given and granted an extension of thirty days from this date in which to make and serve upon the opposing party a record and casemade of said judgment and proceedings, the opposing party to have ten days after service thereof to suggest amendments, said casemade to be settled and signed upon five days' notice by either party.

It is further ordered by the Court that the judgment herein be stayed and superseded for sixty days from this date, and pending the perfection of an appeal from said judgment, and to be stayed and superseded thereafter until the final determination of said appeal in the court of last resort.

L. N. Kimrey, County Judge. (Seal.)

O. K.
McCollum & McCollum, A. A. Davidson, for Johnson Oil Refining Company.

O. K. Ed. Waite Clark, for Plaintiff.

[File endorsement omitted.]

[fols. 116–120] IN COUNTY COURT OF PAWNEE COUNTY

No. 1805

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

ORDER OVERRULING MOTION FOR NEW TRIAL—Nov. 12, 1931

And now on this 12 day of November, 1931, Motion for New Trial of Defendant overruled. Exception. Notice given of an appeal to the Supreme Court.

[fol. 121] IN COUNTY COURT OF PAWNEE COUNTY

No. 1805

In the Matter of the Assessment Against JOHNSON OIL REFINING COMPANY of Alleged Omitted Property for the Year 1928

STIPULATION AS TO CASE-MADE

The parties hereto, by their respective counsel, hereby stipulate and agree that the above and foregoing is a full, true, correct and complete case-made in the above entitled cause, and contains a full, true, correct and complete copy of the transcript of proceedings had before the County Treasurer of Pawnee County, Oklahoma, and of the notice of appeal and appeal bond, and that the foregoing is also a full, true, correct and complete copy and transcript of all the proceedings in the County Court of Pawnee County, on appeal, including all the objections made to the proposed assessment of taxes and all the evidence offered or introduced, findings, motions, orders and rulings made, all the exceptions allowed, and the judgment in said cause, and all of the record upon which the judgment and journal entry in said cause was made. The right to suggest amendments to said case-made, and notice of the settlement and signing thereof, are hereby waived, and it is agreed that said case-made may be settled and signed at any time without further notice by either party.

West, Gibson, Sherman, Davidson & Hull, McCollum & McCollum, Attorneys for Johnson Oil Refining Company. C. E. Mitchell, County Attorney, Pawnee County. Ed Waite Clark, Special Counsel.

[fol. 122] IN COUNTY COURT OF PAWNEE COUNTY

No. 1805

In the Matter of the Assessment Against JOHNSON OIL REFINING COMPANY of Alleged Omitted Property for the Year 1928

NOTICE OF SETTLEMENT OF CASE-MADE

To the attorneys for said plaintiff:

You are hereby notified that on the — day of ——, 1931, at — o'clock — M., or as soon thereafter as counsel can be heard, the case made in said cause, with the amendments heretofore suggested by you, will be presented to the Honorable L. N. Kimrey, at his chambers in the City of Pawnee, Oklahoma, for settlement.

——— ———, Attorneys for Defendants.

Service of the above notice is hereby accepted on this the — day of ——, 1931.

——— ———, Attorneys for Plaintiff.

[fol. 123] IN COUNTY COURT OF PAWNEE COUNTY

No. 1805

In the Matter of the Assessment Against JOHNSON OIL REFINING COMPANY of Alleged Omitted Property for the Year 1928

CERTIFICATE OF CASE-MADE

I, the undersigned, Judge of the County Court within and for the County of Pawnee, State of Oklahoma, do hereby certify that the foregoing was presented to me as a case made in the action above entitled; that at the time of the presentation of said case made to me for settlement and signing, there appeared C. E. Mitchell, County Attorney of Pawnee County, and Ed Waite Clerk, as special counsel on behalf of the State and Pawnee County, and A. A. Davidson and J. A. McCollum, counsel for and on behalf of John-

son Oil Refining Company; and it appearing that corrections in said case made, as served, have been made by mutual agreement of the parties; that no further amendments to said case made as corrected have been suggested by either of the parties; that each of them has waived the right to make such suggestions and has waived notice of the time of settlement, and both parties have, at this time, by their respective counsel, joined in the request that said case made, as so corrected, be settled and signed at this time, and it appearing to me, upon examination thereof, that the same is a true and correct statement and complete transcript of the record and all proceedings in said cause, I do now settle, sign and certify the same as a true and correct case-made, and do hereby direct that the court clerk attest [fol. 124] the same with his name and the seal of said court, and file the same in his office as provided by law.

Witness my hand at Pawnee, in Pawnee County, Oklahoma, this 19 day of December, 1931.

L. N. Kimrey, County Judge.

Attest:

Jos. D. Soulsby, Court Clerk. Ethel Traver, Deputy. (Seal.)

[fol. 125] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 126] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of JOHNSON OIL REFINING COMPANY

No. 23219

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of JOHNSON OIL REFINING COMPANY

No. 23334

In the Matter of the Proposed Assessment of Omitted Property of Johnson Oil Refining Company

No. 23342

The Board of County Commissioners of the County of Pawnee, Oklahoma, The State of Oklahoma ex Rel. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, Plaintiffs in Error,

vs.

Johnson Oil Refining Company, Defendant in Error

Stipulation for Consolidation of Causes—Filed Feb. 11, 1932

It is hereby stipulated and agreed by and between the undersigned, subject to the order of the court, that the foregoing entitled and numbered causes may be consolidated in this court for the purpose of briefing and argument, in as much as each of them involves the same property, to-wit, property of Johnson Oil Refining Company, and presents the question of its taxability, and the right to assess the same for ad valorem taxation by local assessment and taxing officers within the State of Oklahoma.

West, Gibson, Sherman, Davidson & Hull, McCollum & McCollum, Attorneys of Record for Johnson Oil Refining Company. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma. C. K. Templeton, by Leander Hall, Asst. County Attorney of Osage County, Oklahoma. John R. Pearson, of Special Counsel for Osage County, Oklahoma, in Cause #23334. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma.

[fol. 127] In Supreme Court of Oklahoma

23218, 23219, 23334, 23342

[Titles omitted]

Order of Consolidation—Feb. 16, 1932

And now on this day it is ordered by the court that the stipulation of all parties to consolidate the four foregoing causes, be, and the same is hereby approved.

[fol. 128] Minute entry of argument and submission, December 13, 1932, omitted in printing.

[fol. 129] IN SUPREME COURT OF OKLAHOMA

23218

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of JOHNSON OIL REFINING COMPANY

23219

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of JOHNSON OIL REFINING COMPANY

JUDGMENT—Dec. 20, 1932

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby affirmed.

Opinion by Riley, J.

[fol. 130] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

Error from the County Court of Pawnee County, State of Oklahoma

Honorable L. N. Kinerey, Judge

Affirmed

No. 23219

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

Error from the County Court of Pawnee County, State of Oklahoma

Honorable L. N. Kinerey, Judge

Affirmed

No. 23342

In the Matter of the Proposed Assessment and Valuation of Property of JOHNSON OIL REFINING COMPANY

Error from the District Court of Pawnee County, State of Oklahoma

Honorable Thurman S. Hurst, Judge

Reversed and Remanded

No. 23334

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

Error from the County Court of Osage County, State of Oklahoma

Honorable Henry Wood, Judge

Reversed

Syllabus

Where tank cars are owned by a refining company incorporated in a foreign state, but authorized to do business in this State, it having but one refinery and that located in this State and such tank cars are used by such company to transport refined products in intrastate and interstate commerce and all of such cars are returnable when empty to the refinery, all such cars are taxable as personal property of such corporation in the county where such refinery is

located. None of such cars are taxable in another county merely because some of such cars are temporarily within such other county.

C. E. Mitchell, County Attorney of Pawnee County; Ed Waite Clark, P. E. Rowe, R. K. Robertson, for Pawnee County.

[fol. 131] C. K. Templeton, County Attorney of Osage County; Leander Hall, Frank T. McCoy, John R. Pearson, John T. Craig, for Osage County.

Chas. Y. Freeman, McCollum & McCollum, West, Gibson, Sherman, Davidson & Hull, for Johnson Oil Refining Company.

[fol. 132] OPINION—Filed Dec. 20, 1932

RILEY, J.:

Causes #23,218, and #23,219, originated in the County Treasurer's office of Pawnee County. They were begun by the Tax Ferrett. Appeals were taken to the County Court and tried there by stipulation upon the same evidence. The appeals here are separate. The County Court directed the entry upon the tax rolls of the taxable value of 380 tank cars owned by the Johnson Refining Company for the years 1925-28, inclusive. The taxable situs was found to be at Cleveland, Pawnee County, Oklahoma. From the County Court appeals were perfected to this Court.

Cause #23,342, originated in the Board of Equalization of Pawnee County. The Johnson Refining Company had listed for taxation for the year 1931, tank cars in the number 64. The Board upon notice assessed 381 such cars. The refinery appealed to the district court where a judgment was entered directing the taxation of what was found to be the average number of tank cars (64) situated in the County during the year. From that judgment both the County and the taxpayer have appealed to this Court.

These tank cars are engaged in inter-state and intra-state commerce. By the use of them the Johnson Oil Refinery Company transports refined petroleum products from its refinery at Cleveland, Pawnee County, Oklahoma, to various points within and without this State. Occasionally

the refinery purchases for resale products from other refineries and in that event the cars are shunted elsewhere for that purpose. These cars are marked: "Johnson Oil Refining Company, Cleveland, Oklahoma", or "when empty return to Johnson Oil Refining Company, Cleveland, Oklahoma". The empty cars are, unless diverted by special order, as aforesaid, returned to Cleveland. Repair trackage is maintained at Cleveland. This accommodates from 12 to 15 cars, and at that point alone is located replacements and material for repair of these cars. Other track- [fol. 133] age at Cleveland accommodates 65 cars. The refinery loads from 35 to 40 cars per day. The cars upon return remain upon the tracks from 24 hours to 10 days depending on demand. This company is incorporated under the laws of Illinois and maintains an office at Chicago, but no trackage for the cars is there. Cleveland is the one place where the company always has use for these cars. All of these cars are allocated to the refinery at Cleveland, although movements of the cars in the delivery of products seems to be the result of sales contracts made from the office at Chicago. O. C. Goward is the Superintendent of Transportation for the refinery whose location is Cleveland. The Cleveland office had control and supervision of these cars (R. p. 34, Cause #23,342). Empty cars are stored at Osage, Osage County, Oklahoma, and Parsons by the railroad company when congestion occurs, they are subject to order and return to Cleveland when needed. The need is communicated to the railroad each day (R. p. 35, Cause #23,342). No tax is paid on these cars in Oklahoma, and no ad valorem tax is paid upon them in Illinois (R. p. 4, Cause #23,342).

Section 9574, C. O. S., 1921, provides:

"All property in this state, whether real or personal, including the property of corporations, banks and bankers except such as is exempt, shall be subject to taxation."

A lawful tax upon this property is dependent upon whether it has a situs for taxation at the time when and the place where the levy is sought to be made.

The corporation resists the tax in whole, asserting the situs for taxation is not within this State; that despite the fact it listed for taxation in Pawnee County, 64 cars during one of the years it is not estopped to deny taxation in toto.

It asserts that the cars were but temporarily at Cleveland as an incident to its interstate commerce. However, we find that the absence of the cars from Cleveland is but an incident to the conduct of its business. The corporation [fol. 134] possesses but one refinery. It is located at Cleveland. In our opinion the taxable situs is there. Travis v. Dicky, 96 Okla. 256, 222 P. 527; State v. Timbrooks Est. 129 S. W. 1068. When this property is away from that point it is in transit, but its destination is always Cleveland, Pawnee County, Oklahoma. So this property has acquired a definite situs which takes it out of the general rule that personal property has its taxable situs at the domicile of the owner. Gulf Ref. Co. v. Tillinghast 94 So. 418, 26 R. C. L. 273. Within the terms of the statute these cars constitute "property within this State". They are merely temporarily absent at times from the Cleveland refinery, and then in transit for the delivery of products at various points. The entire number of tank cars are taxable in Pawnee County. Williamson v. Prairie Cattle Co., 5 Okla. 497.

The judgments of the County Court are affirmed.

There is no law authorizing a tax based upon an "average number" of cars present on a given day at any one taxable point, and there was no application of that principle by administrative officers.

The judgment of the District Court is erroneous as a matter of law. It is reversed with directions to render judgment directing a listing for taxation of the entire number of the tank cars that have their base for operations within Pawnee County for the years involved.

There is another case herewith presented and considered on oral argument. It comes from Osage County and is styled and numbered, In the Matter of Assessment of Omitted Property of Johnson Oil Refg. Co., #23,334. Therein Osage County is claiming the right to collect taxes upon 50 of the cars already considered. The judgment therein was based upon an "average number theory" and predicated upon the presence of that number of these cars upon the railway siding in possession of the railroad, subject to call from the refinery at Cleveland. In our opinion these cars did not have a permanent abiding place within Osage [fol. 135] County, and were not subject to taxation elsewhere than in Pawnee County.

The judgment in that cause is reversed with directions to dismiss the action.

Clark, C. J.; Hefner, Cullison, Swindall, McNeill, Kornegay, JJ., concur.

Lester, C. J.; Andrews, J., absent.

[fol. 136] [File endorsement omitted]

[fol. 137] IN SUPREME COURT OF OKLAHOMA

No. 23218, No. 23219, No. 23342

[Titles omitted]

(Consolidated)

[fol. 138] PETITION FOR REHEARING—Filed Jan. 14, 1933

Now comes Johnson Oil Refining Company and respectfully petitions the court to grant a rehearing in the above entitled causes, and as grounds therefor the petition says:

I

The court has overlooked the controlling effect of a fundamental principle of taxation, applicable to the facts of record, viz., that the right of a state, or municipality, to tax depends upon, and is measured by its ability to give the protection of its laws to the property taxed, taxation and protection being reciprocal.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194;
Cooley on Taxation, Vol. 1, p. 83;
Webster v. City of Fargo, 82 N. W. 732;
Rolph v. City of Fargo, 76 N. W. 242;
Williams v. Detroit, 2 Mich. 560;
Mobile v. Baldwin, 51 Ala. 61;
Chicago & Northwestern R. R. Co. v. State, 108 N. W. 557;
Cooley's Constitutional Limitations (4th ed.), p. 617.

It is upon this principle that the cars of Johnson Oil Refining Company, engaged in the business of their owner in other states, are taxed there, proportioned to the bene-

[fol. 139] fits accorded them while in such states on such business.

American Refrigerator Transit Co. v. Hall, 174 U. S. 70;
Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18;
Union Refrigerator Transit Co. v. Lynch, 177 U. S. 194;
Gray on "Limitations of the Taxing Power", p. 59;
Keith Ry. Equipment Co. v. Board of Review, 119 N. E. 302.

Upon the foregoing principle:

(a) The admitted use, and the continuous presence, of the major part of the cars, at all times, in other states, and on business which makes such continued use and employment necessary in the free conduct of that business, precludes the possibility of an actual situs for the entire fleet in Pawnee County, or at any one place.

(b) Because of the uncontroverted fact that more than 300 cars of the fleet are continuously absent from the state (not the identical cars, but on an average), engaged in a distinct and separate business from the operation of the refinery, the State of Oklahoma cannot afford the protection of its laws to such cars, the same being subject to the laws of other states in which they are transacting the business of their owner.

[fol. 140] The fleet of cars cannot therefore be taxed as a whole, as was done by the taxing authorities of Pawnee County, on the basis of an actual situs there, because the fleet as a whole was never in Pawnee County or in the state, and therefore such a tax is not only unequal and double taxation, but amounts to a taking of private property without just compensation and to a taking of property without due process of law, and deprives Johnson Oil Refining Company of the equal protection of the law, which constitutional guaranties petitioner has at all times invoked in respect to the taxes assessed against its said property.

Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341;

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226;
Frick v. Pennsylvania, 268 U. S. 473;
Louisville Ferry Co. v. Kentucky, 188 U. S. 385;
Union Transit Co. v. Kentucky, 199 U. S. 194.

II

The conclusion of the court overlooks the uncontradicted and fundamental fact that the main and principal business of Johnson Oil Refining Company is the marketing of refinery products in interstate commerce, and not, as the opinion indicates, the operation of the refinery at Cleveland, the [fol. 141] refinery being a distinct entity and but one of the sources of the commodities dealt in and sold in interstate commerce, which, though taxable as a separate entity because of its location, is an adjunct to the main business in which the company makes its profits.

In arriving at its conclusion the court has overlooked the evidence that the same cars are used also in the transportation of refinery products from other refineries as well as from the refinery at Cleveland, and that they are used in the transportation of the products of the company's lubricating plant at Chicago Heights, as well as transporting gasoline from its bulk stations located in several states (C-m. 23328, p. 19).

It also overlooks the evidence that the cars are an investment in the marketing business, not in the refinery (C-m. 23342, p. 19).

It has also overlooked the testimony that no cars were allotted to the refinery, but were in fact used generally, and without discrimination, in the company's marketing business (C-m. 23334, p. 58).

It has overlooked the testimony that such control as the Cleveland office has over the cars is for routing purposes only (C-m. 23342, p. 34) and that the Cleveland office is a record office only and has nothing to do with the marketing business nor with the control of tank cars (C-m. 23218, p. 58).

It also has overlooked the fact that taxes were imposed and paid on the cars in seventeen states of the Union, in [fol. 142] all but two of which the tax is upon an ad valorem basis (C-m. 23342, pp. 16, 17; C-m. 23334, pp. 59, 60; C-m. 23334, p. 25).

III

The cars are not an integral part of the refinery, which is a local business, and the functions of which are confined solely to the manufacture of refinery products, wholly independent of the ownership and use of tank cars. The sole function of the cars is transportation, it being immaterial who manufactures or produces the commodity transported. Being owned by a non-resident, they cannot be taxed in Oklahoma, Section 9583, C. O. S. 1921.

IV

The court has overlooked the very serious consequence of its decision that the entire fleet of cars is taxable in and by Pawnee County. The cars are the instrumentalities and means by which a foreign marketing business is carried on in states other than Oklahoma. The same instrumentalities are subject to such tax as the respective states in which they enter to transact the business of their owner may impose, and have in fact imposed, in the exercise of a right recognized by the Supreme Court of the United States. To tax the entire fleet in Oklahoma is to infringe upon the freedom of commerce, being practically a denial of the right of the company to engage in interstate busi- [fol. 143] ness and to import merchandise, by means of these cars, into other states, and, in effect, denies the right of such other states to exercise the same privilege accorded to the State of Oklahoma, if it sees fit to exercise it.

V

The case of Prairie Cattle Co. v. Williamson, 5 Okla. 488, cited in the opinion, is not, we submit, in point. In that case cattle of the Prairie Cattle Company, evidently a non-resident, were found in Beaver County, Oklahoma, into which they had drifted from another range. The number of such cattle in Beaver County, grazing there in the year 1895, was estimated to be six hundred. The decision that the cattle were taxable in Beaver County rested upon a special statute providing that "whenever any live stock shall be located in this territory for the purpose of grazing it shall be deemed to have acquired an actual situs there for the purposes of this act," and which was an act provid-

ing for taxation of personal property "located in any county of this territory after the first day of March of any year, which shall acquire an actual situs therein before the first day of September." The court held that the legislature had authority to give such cattle a taxable situs. We submit, therefore, that the decision is inapplicable to the record in these cases as an authority on the question of actual situs, as distinguished from a legislative situs.

[fol. 144] We submit, therefore, upon the facts, that the tax assessed is beyond the power of the state to impose, and upon property not within its jurisdiction, is an infringement upon the freedom of commerce, places an undue burden upon interstate commerce and violates the Fourteenth Amendment to the Constitution of the United States.

For the foregoing reasons, and in view of the tax assessments on the property, amounting to over a million dollars and entailing a heavy burden of taxation, and in view of the important questions involved, and the far reaching effect of the decision, we earnestly request a rehearing and reconsideration of these cases.

Chas. Y. Freeman, McCollum & McCollum, West & Davidson, Attorneys for Johnson Oil Refining Company.

[fol. 145] IN SUPREME COURT OF OKLAHOMA

23218, 23219, 23334, 23342

[Titles omitted]

(Consolidated)

ORDER DENYING PETITION FOR REHEARING—Jan. 31, 1933

And now on this day it is ordered by the court that the petition for rehearing filed in the above cause- be, and the same is hereby denied.

Swindall, J., dissents.

[fol. 146] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218, No. 23219, No. 23342

[Titles omitted]

(Consolidated)

DISSENTING OPINION ON REHEARING—Filed Jan. 31, 1933

SWINDALL, J., dissenting:

An opinion was rendered in these consolidated causes by this court on the 20th day of December, 1932, with which I cannot agree.

The Johnson Oil Refining Company is a corporation organized under the laws of the State of Illinois engaging in the business of refining and selling petroleum products. To facilitate its business it maintains and operates a fleet of approximately 381 railroad oil tank cars. By the use of them the Johnson Oil Refining Company transports refined products from its refinery at Cleveland, Pawnee County, Oklahoma, to various points within and without this state. Sometimes the company purchases for resale products from other refineries and in that event the cars are shunted elsewhere for that purpose. These cars are marked "Johnson Oil Refining Company, Cleveland, Oklahoma," and "When empty return to Johnson Oil Refining Company, Cleveland, Oklahoma." The empty cars are, unless diverted by special order as aforesaid, returned to Cleveland. [fol. 147] Repair trackage is maintained at Cleveland which accommodates from 12 to 15 cars, and at that point alone is located replacements and material for repair of these cars. Other trackage at Cleveland accommodates 65 cars. The refinery loads from 35 to 40 cars per day. The cars upon return remain upon the tracks from 24 hours to 10 days depending on demand. Throughout the year the company has an average of approximately 64 cars per day at Cleveland, Pawnee County, Oklahoma, and an average of approximately 50 cars per day at Osage, Osage County, Oklahoma, where incoming and outgoing cars are held by the railroad company when congestion occurs at the refin-

ery and when economical railroading requires. The remainder of the 381 cars are outside the State of Oklahoma in various other states. The cars move in sixteen states. This company maintains an office in Chicago where its officers having ultimate executive control reside. But, no trackage for cars is maintained in Chicago. Cleveland is the one place where the company always has use for these cars. All of the cars are allocated to the refinery at Cleveland, although movements of the cars in the delivery of products are the result of sales contracts made from the office in Chicago, Illinois. The superintendent of transportation for the refinery lives in Cleveland and that office has control and supervision over the cars. No tax is paid on these cars in Oklahoma. A capital stock tax is paid in Illinois and they are taxed as personal property in several of the states in which they travel.

Upon these facts the opinion delivered in the causes held, first, that none of the cars were taxable in Osage County, Oklahoma, and, second, that the entire fleet of 381 cars were taxable in the State of Oklahoma in Pawnee County on the theory that all of them had their situs at that place in this state. It is from this latter proposition that I dissent. The tax sustained by the opinion is clearly a direct tax upon tangible personal property a large proportion of which is constantly outside the State of Oklahoma, although [fol. 148] the specific items of property making up the whole are regularly in and out of the state. It is my opinion that a tax so laid is a violation of the 14th Amendment to the Constitution of the United States, that the State of Oklahoma is taxing property outside its jurisdiction.

Mobilia sequuntur personam was a well established maxim of the common law, and the situs of personal property of every description, wherever it was actually kept or located, was held to be at the domicil of the owner and the property was subject to the jurisdiction of the owner's sovereign. 26 R. C. L. p. 273-4, citing St. Louis v. Wiggins Ferry Co., 11 Wall. 423, 20 U. S. (L. Ed.) 192, and Sangamon, etc., R. Co. v. Morgan County, 14 Ill. 163, 56 Am. Dec. 497. It is said that this doctrine grew up when most personal property was of a nature which was kept close to the person of the owner, was small in amount, and was seldom removed from one jurisdiction to another without the removal also of its owner. In recent times,

with the growth of modern industry and transportation, an extraordinarily large body of tangible and intangible personal property has arisen which has its location and ownership entirely independent of the domicil of the owner. In response to this situation the doctrine of location for taxation of personal property has changed.

One of the earlier cases noting the weakness in the fiction mobilia sequuntur personam and pointing to actual situs as the proper place for taxation was Hoyt v. The Commissioners of Taxes, 24 N. Y. 224. In that case the court said:

"It is said, however, that personal estate by a fiction of law has no situs away from the person or residence of the owner, and is always deemed to be present with him at the place of his domicil. The right to tax the relator's property situated in New Orleans and New Jersey rests upon the universal application of this legal fiction; and it is accordingly insisted upon as an absolute rule or principle of law which, to all intents and purposes, transfers the property from the foreign to the domestic jurisdiction, and thus subjects it to taxation under our laws. Let us observe to what results such a theory will lead us. The [fol. 149] necessary consequence is, that goods and chattels actually within this State are not here in any legal sense, or for any legal purpose, if the owner resides abroad. They cannot be taxed here, because they are with the owner who is a citizen or subject of some foreign state.

* * * * * * *

"Accordingly there seems to be no place for the fiction of which we are speaking, in a well adjusted system of taxation. In such a system a fundamental requisite is that it be harmonious. But harmony does not exist unless the taxing power is exerted with reference exclusively either to the situs of the property, or to the residence of the owner. Both rules cannot obtain unless we impute inconsistency to the law, and oppression to the taxing power. Whichever of these rules is the true one, whichever we find to be founded in justice and in the reason of the thing, it necessarily excludes the other; because we ought to suppose, indeed we are bound to assume, that other States and Governments have adopted the same rule."

The law in this country seems to have developed consonant with the thought contained in that opinion. The Supreme Court of the United States has definitely and unequivocally established the principle that tangible personal property is taxable at its actual situs. Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. Ed. 1077, and cases cited post. See also Prairie Cattle Co. v. Williamson, 5 Okl. 488, 49 Pac. 937. It holds to the view that taxation by a state of such property having situs outside its boundaries is a violation of the 14th Amendment to the Constitution of the United States. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 195, 50 L. Ed. 150. On the other hand, in the field of intangible property the law in most cases, depending upon the circumstances, still holds to the doctrine that such property is taxable at the domicil of the owner. In the Union Refrigerator Transit Co. v. Kentucky case, supra, Mr. Justice Brown, delivering the opinion of the court, said:

[fol. 150] "Respecting this, there is an obvious distinction between tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the state of its situs except, perhaps, in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a state other than that of his domicil, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim mobilia sequunter personam, and to hold that the property may be taxed at the domicil of the owner as the real situs of the debt, and also, more particularly in the case of mortgages, in the state where the property is retained. Such have been the repeated rulings of this court. (Citations.)

"If this occasionally results in double taxation, it much oftener happens that this class of property escapes altogether. In the case of intangible property, the law does not look for absolute equality, but to the much more practical consideration of collecting the tax upon such property, either in the state of the domicil or the situs. * * *"

See 26 R. C. L. p. 282; Notes, 56 Am. Dec. 527, L. R. A. 1915C 914.

The property involved in the case at bar is tangible personalty and would ordinarily fall under the rule which taxes such property at its situs irrespective of the domicil of the owner. However, a prerequisite to the taxation of such property at its situs is that it have a situs, and this property is of a class which in its nature is mobile and may, therefore, move from place to place with such rapidity that it is extremely difficult to assign to it a definite location. While the sovereign has certain jurisdiction over every chattel situated within its territory, not every chattel which happens to be so situated can be regarded as having a taxable situs there. A chattel merely temporarily within the limits is not subject to the ordinary property tax. It [fol. 151] must have become identified with the jurisdiction as a part of its property. See Commonwealth v. Union Pac. R. Co., 214 Ky. 339, 283 S. W. 119, 49 A. L. R. 1091; Kelley v. Rhoads, 188 U. S. 1, 47 L. Ed. 359, 23 Sup. Ct. Rep. 259; Robinson v. Longley, 18 Nev. 71, 1 Pac. 377; Brown v. Houston, 114 U. S. 622, 29 L. Ed. 257, 5 Sup. Ct. Rep. 1091; Coe v. Errol, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. Rep. 475; and the cases regarding vessels cited post.

The Supreme Court of the United States has dealt with the problem of jurisdiction to tax this type of property a number of times and a review of some of the decisions sheds much light upon the solution. We are, of course, bound in the present case by its decisions.

In dealing with property of this sort that court has sanctioned the taxation of the fixed value of such property continuously within the state during the taxing period by any method which fairly arrives at that value, although the individual units thereof are constantly changing and are not, as such, identified with the jurisdiction. In Union Tank Line Co. v. Wright (1919) 249 U. S. 275, 63 L. Ed. 602, the court, in considering the proper measure of value for taxation of railway tank cars used in and out of a non-domiciliary state, said:

"A state may not tax property belonging to a foreign corporation which has never come within its borders; to do so under any formula would violate the due process clause of the 14th Amendment. In so far, however, as movables are regularly and habitually used and employed therein,

they may be taxed by the state according to their fair value, along with other property subject to its jurisdiction, although devoted to interstate commerce. While the valuation must be just, it need not be limited to mere worth of the articles considered separately, but may include as well 'the tangible value due to what we have called the organic relation of the property in the state to the whole system'. How to appraise them fairly when the tangibles constitute a part of a going concern operating in many states often presents grave difficulties; and absolute accuracy is gen- [fol. 152] erally impossible. We have accordingly sustained methods or appraisement producing results approximately correct—for example, the mileage basis in case of a telegraph company (Western U. Teleg. Co. vs. Atty. Gen. (1888) 125 U. S. 530, 31 L. Ed. 790, 8 Sup. Ct. Rep. 961), and the average amount of property habitually brought in and carried out by a car company (American Refrigerator Transit Co. v. Hall (1899) 174 U. S. 70, 43 L. Ed. 899, 19 Sup. Ct. Rep. 599). But if the plan pursued is arbitrary, and the consequent valuation grossly excessive, it must be condemned because of conflict with the commerce clause or the 14th Amendment, or both. Western U. Teleg. Co. v. Atty. Gen., 125 U. S. 530, 31 L. Ed. 790, 8 Sup. Ct. Rep. 961; Marye v. Baltimore & O. R. Co., 127 U. S. 117, 32 L. Ed. 94, 8 Sup. Ct. Rep. 1037; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 26, 35 L. Ed. 613, 617, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. Ed. 683, 17 Sup. Ct. Rep 305, s. c. 166 U. S. 185, 41 L. Ed. 965, 17 Sup. Ct. Rep. 604; American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 43 L. Ed. 899, 19 Sup. Ct. Rep. 599; Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149, 44 L. Ed. 708, 20 Sup. Ct. Rep. 631; Fargo v. Hart, 193 U. S. 490, 48 L. Ed. 761, 24 Sup. Ct. Rep. 498; Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 453, 62 L. Ed. 827, 829, 38 Sup. Ct. Rep. 373."

Two of the cases cited above, American Refrigerator Transit Co. v. Hall (1899) and Union Refrigerator Transit Co. v. Lynch (1900), consider specifically the taxation of cars similar to those involved in the present case by a non-domiciliary state. In these cases the facts are essentially the same. In each the owner was engaged in supplying cars to shippers wherever needed; the cars were not confined to any particular route; were run indiscriminately

over the lines of railroad over which consignors of freight shipped in such cars choose to route them; had no regular intervals nor any regular number; were engaged solely in interstate commerce; and when in the state were only transiently present. The average number within the state dur- [fol. 153] ing the taxing period in the Lynch case was ten cars per day. That case relied heavily upon the authority of the Hall case in which the court said:

"It having been settled, as we have seen, that where a corporation of one state brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed. Nor would the fact that such cars were employed as vehicles of transportation in the interchange of interstate commerce render their taxation invalid. Marye v. Baltimore & O. R. R. Co., 127 U. S. 123; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18."

The same question was presented in Germania Refining Co. v. Fuller, 245 U. S. 631, 62 L. Ed. 521 (181 Mich. 618) wherein the cars were oil tank cars and the court affirmed the case by memorandum opinion upon the authority of the two cases supra. See also Prairie Cattle Co. v. Williamson, supra, where the Oklahoma Territorial Court sustained a tax on the average theory.

After the decisions in these two cases the question of the power of the domiciliary state to tax the same character of property was presented in the case of Union Refrigerator Transit Co. v. Kentucky (1905), 199 U. S. 195, 50 L. Ed. 150. In that case the cars were employed by the company by renting them to shippers, who took possession of them from time to time at Milwaukee, Wisconsin, and used them for the carriage of freight in the United States, Canada, and [fol. 154] Mexico. The domiciliary state, Kentucky, taxed the entire fleet of 2,000 cars for the years 1897, 1898, 1899,

and 1900. During those years the average number of cars used in Kentucky per day was 28, 29, 40, and 67, respectively. The court treated the tax as one upon "tangible personal property permanently located in other states," and held the same invalid on the ground that the domiciliary state had no power to tax such property. The opinion indicated, however, that Kentucky could have taxed the average used within its borders. It said:

"We are of opinion that the cars in question, so far as they were located and employed in other states than Kentucky, were not subject to the taxing power of that commonwealth, and that the judgment of the Court of Appeals must be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion."

No intimation was made, or needed, with respect to where the excess cars were taxable.

Following this case within less than a year the court again passed upon the power of the domiciliary state in the case of New York C. & H. R. R. Co. v. Miller (1906), 202 U. S. 584, 50 L. Ed. 1155. There the state of New York taxed all of the rolling stock of a railroad company although a considerable proportion of it was constantly outside the limits of the state. The relator contended that the proportion constantly outside should be deducted from the New York tax. No showing was made that any specific items were used continuously and exclusively outside of the state during the whole tax year; the court specifically assumed that none were. The court referred to the cases limiting the power of the domiciliary state to tax, including Union Refrigerator Transit Co. v. Kentucky, supra, then said:

"But it has not been decided, and it could not be decided, that a state may not tax its own corporations for all their property within the state during the tax year, even if every item of that property should be taken successively into [fol. 155] another state for a day, a week, or six months, and then brought back."

Again, in answer to the contention that the present case was but the complement of those cases holding such property taxable in non-domiciliary states, the court said:

"In the present case, however, it does not appear that any specific cars of any average of cars was so continuously in any other state as to be taxable there. The absences relied on were not in the course of travel upon fixed routes, but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads."

A consideration of these cases, together with the history of the law on this subject, elucidates some of the principles governing the decisions. When the industrial revolution increased enormously the body of tangible and intangible personal property the maxim mobilia sequuntur personam was already established and the courts followed it until the necessity of taxing personalty at its actual situs became obvious. They then departed from the maxim in favor of the situs, but for the latter to apply the property must have become identified with a jurisdiction other than that of its owner. There remained a class of property for which no situs could be definitely defined. A strong feeling has constantly obtained that no thing of value should escape taxation altogether. So, in such cases, the courts have retained the domiciliary theory. This, it seems, should alleviate the necessity of a court seeking out the most definite of several elusive possible situses and oblige it to uphold a tax only when the property has a defined situs within the taxing jurisdiction. Complementary action of other states should equalize the burdens. Property difficult of location has frequently been held taxable in two states. While the courts have not exhibited squeamishness at this situation, they have, nevertheless, tried on the whole to develop a harmonious system. With respect to property similar to that involved herein Mr. Justice Lurton in [fol. 156] Southern P. Co. v. Kentucky, 222 U. S. 63, 56 L. Ed. 96, expressed the feeling of difficulty of taxing at the situs as follows:

"To lay down a principle that vessel property has no situs for purposes of taxation other than that of actual permanent location would introduce elements of uncertainty concerning the situs of such property not presented by other kinds of movable property."

Such a principle would lead to conflicts in taxation between states and disrupt the harmony of the taxing system as a whole. Unfortunate individuals engaged in legitimate trade between states would suffer hardship. Under certain circumstances the courts have applied the theory of fixed value with changing identity. The items of property do not have a situs within the state but the fixed value is always present. In fairness to that state it should be taxable. Yet, it would be a violation of the very principle upon which the theory is set if the state were allowed to tax a greater amount than the value existing within its borders or to tax where no fixed value really exists. It seems that the minimum should be where there is sufficient average continuously used within the state so that it may be said that the average value is identified with the jurisdiction and the maximum should include only that value. Random excursions of cars into a state in insufficient quantity or with insufficient continuity to create a fixed value identified with the jurisdiction should not justify a tax. In harmony with the feeling that all property should be taxed somewhere such property should be taxed at the domicil of the owner. See New York C. & H. R. R. Co. v. Miller, supra.

In the present case I have no doubt that the average value of the property used in this state is taxable herein. On the other hand, it seems clear that under the decisions cited above much of this property was properly taxable in states other than Oklahoma and another part of it probably had no such definite location as to be taxable at its situs at all. If Oklahoma sustains a tax upon all of the property it has violated the interests of harmony in the taxation of such property. The same is true even if we hold that each item of property has an actual situs in this state, [fol. 157] though I do not say that it would not then all be taxable here. But, I do feel that such consideration should make us reluctant to find that situs. Again, with respect to such part as perhaps has no taxable average elsewhere, we should not try to import a situs by any forced conceptions, on the theory that the most definite situs is in this state, but should yield to the domiciliary jurisdiction.

It is my opinion that each unit of the property involved in this case, that is, each tank car, cannot upon analysis be held to have an actual situs in the State of Oklahoma. Each

car came into and went out of the state during the taxing period. It stayed at the refinery from 24 hours to 10 days each trip. And there were always a greater number out of the state than in its boundaries, so each car must have remained outside the state considerably longer than it did inside. The fact that the cars were used to transport the products of the refinery at Cleveland, that all other points to which they went were haphazard, that they were returnable when empty to Cleveland, that the company repaired them there and maintained storage tracks for them at that place, and that they were always in demand at Cleveland only, does not seem to me sufficient to establish their situs in toto in Oklahoma. These facts are but evidentiary of the essential factor—that each car is as a whole identified with this jurisdiction. There remains the company's purpose to, and the fact that it did, use these cars widely in interstate commerce, that the cars were in fact employed more out of the state than in it. Purpose coupled with action seems to be the controlling principle in assigning a situs to chattels. See Delaware, L. & W. R. Co. v. Pennsylvania, Kelley v. Rhoads, Robinson v. Longley, Brown v. Houston, and Coe v. Errol, all cited supra.

Some of the cases most closely in point in the present situation are the cases decided in the Supreme Court of the United States concerning the situs for taxation of vessels. In the case of Hays v. Pacific Mail S. S. Co. (1855) [fol. 158] 17 How. 596, 15 L. Ed. 254, California laid a tax upon ocean-going vessels. They were owned by a New York corporation and operated by way of Panama to San Francisco, California, and points in the Territory of Oregon. The ships operated on schedule and were in each port long enough to transact their business there. After discharging at San Francisco they proceeded to Benicia, California, where the company maintained a naval dock and a ship-yard for its ships to put in when not otherwise engaged, for repairs, and to await the commencement of the next voyage, usually ten or twelve days. The court held that these ships had no situs for taxation in California.

In Morgam v. Parham (1873) 16 Wall. 471, 21 L. Ed. 303, the vessel operated on a schedule between Mobile, Ala., and New Orleans, La., touching each port about three days per week. The ship was owned by a resident of New York

and was registered in that state. The captain resided in Mobile and a superior agent resided in New Orleans. The ship never went into other waters. The court held the ship, together with others in the same situation, had no situs for taxation in Alabama, and said that such situs was in New York.

In 1905, in Old Dominion S. S. Co. v. Virginia, 198 U. S. 298, 49 L. Ed. 1059, the court held that a ship on navigable waters operating wholly within the state of Virginia but engaged in interstate commerce, had a situs for taxation in that state.

In 1906 it decided Ayer & Lord Tie Co. v. Kentucky, 202 U. S. 409, 50 L. Ed. 1082, wherein vessels and barges operated on inland waters. They were owned in Illinois, had "Paducah, Kentucky" painted on their stern, and when not in use were kept in Paducah. The court held that they had no situs for taxation in Kentucky.

When one compares these cases with the facts in the case at bar it seems to me that we cannot escape the conclusion that each of these cars used into and out of the [fol. 159] state of Oklahoma did not have its taxable situs in this state.

For the foregoing reasons I am of the opinion that the State of Oklahoma has no jurisdiction to tax the entire number of 381 cars owned by the Johnson Oil Refining Company and that a tax so assessed is a violation of the 14th Amendment of the Constitution of the United States. I, therefore, most respectfully dissent.

[fol. 160] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218, No. 23219, No. 23342

[Titles omitted]

APPLICATION FOR STAY OF MANDATE—Filed Feb. 2, 1933

Now comes Johnson Oil Refining Company and moves the Court to enter an order staying and withholding the man-

date, or mandates, in the above entitled causes, because it is the bona fide intention of Johnson Oil Refining Company, within the time provided by law, to appeal from the decision of the Court to the Supreme Court of the United States, or to make application to said Supreme Court of the United States for a writ of certiorari, as movant may be advised as to the proper procedure.

Johnson Oil Refining Company, by Chas. Y. Freeman, McCollum & McCollum, West & Davidson, Its Attorneys.

[fol. 161] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218, No. 23219, No. 23342

[Titles omitted]

CERTIFICATE OF COUNSEL—Filed Feb. 2, 1933

In connection with the motion of Johnson Oil Refining Company to stay mandate in the above entitled causes, I hereby certify that it is the bona fide intention of Johnson Oil Refining Company to prosecute an appeal from the decision and judgment of this Court in the above entitled causes to the Supreme Court of the United States, or to make proper application to said Court for a writ of certiorari, within three months from and after the overruling by this Court of the petition of Johnson Oil Refining Company for rehearing, and which petition was denied by said Court, and that I believe there is merit in said causes, and that the judgment of the Supreme Court of Oklahoma ought to be reversed by the Supreme Court of the United States.

Dated this 2d day of February, 1933.

A. A. Davidson, Counsel for Johnson Oil Refining Company.

[fol. 162] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218, No. 23219, No. 23342

[Titles omitted]

ORDER STAYING MANDATE—Filed Feb. 4, 1933

Motion of Johnson Oil Refining Company for a stay of the mandate herein came on to be heard *heard*:

On consideration whereof, it is now here ordered by the Court that no mandate of this Court issue in the above entitled and consolidated causes until April 1, 1933, and that if within said time Johnson Oil Refining Company shall have perfected an appeal to the Supreme Court of the United States, or if there is filed with the clerk of this Court a certificate of the clerk of the Supreme Court of the United States that a petition for certiorari and record have been filed in that Court, the stay hereinabove granted shall continue until the final decision of said causes in the Supreme Court of the United States.

Done by order of Conference.

Fletcher Riley, Chief Justice of the Supreme Court of Oklahoma.

[fol. 163] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

No. 23219

[Title omitted]

PETITION FOR APPEAL—Filed March 16, 1933

[fol. 164] Now comes petitioner and appellant, Johnson Oil Refining Company, a corporation organized and existing under and by virtue of the laws of Oklahoma, and represents that on the 20th day of December, 1932, a judgment was rendered by the Supreme Court of Oklahoma in the above entitled and numbered cause, against the petitioner,

in which it avers errors were committed to its prejudice, all of which will more fully appear from the following assignment of errors:

Wherefore petitioner and appellant, considering itself aggrieved by said judgment, prays that it be allowed an appeal therefrom to the Supreme Court of the United States, in order that the errors so complained of may be corrected.

Assignment of Errors

Now comes the appellant above named, and filing herewith its petition for appeal, says that in the record and proceedings, and in the decision in the above entitled cause, manifest error has intervened to the prejudice of your petitioner, and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment of errors:

1. The Supreme Court of Oklahoma in its judgment construing the statute of the State of Oklahoma, Sec. 1, Ch. 44, Session Laws 1915, p. 64 (Sec. 9574, C. O. S. 1921) under which the cars of the appellant had been held taxable by the State Taxing Authorities, so as to bring within its provisions as to taxability the property in question belonging to the appellant, committed error, in that the statute as so [fol. 165] construed by the Supreme Court of Oklahoma is repugnant to the Constitution of the United States, particularly the Fourteenth Amendment thereto.

2. The Supreme Court of Oklahoma in its judgment construing the statute of the State of Oklahoma, Sec. 1, Ch. 44, Session Laws 1915, p. 64 (Sec. 9574, C. O. S. 1921) under which the cars of the appellant had been held taxable by the State Taxing Authorities, so as to bring within its provisions as to taxability the property in question belonging to the appellant, committed error, in that the statute as so construed by the Supreme Court of Oklahoma deprives the appellant of its property without due process of law in contravention of the provisions of the Fourteenth Amendment of the Constitution of the United States.

3. The Supreme Court of Oklahoma erred in reversing the judgment of the District Court of Pawnee County, Oklahoma, which held that the tax imposed by the taxing of-

ficials of Pawnee County, Oklahoma, in appellant's entire fleet of cars was a taking of property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of Oklahoma erred in holding that the assessment of a tax by the taxing officials of Pawnee County, Oklahoma, on the entire fleet of cars of appellant, an Illinois corporation having its principal office and place of business in Chicago, Illinois, was within and authorized by the statute of Oklahoma (Sec. 1, Ch. 44, Session Laws [fol. 166] 1915, p. 64) providing that all property in the State of Oklahoma, except such as is exempt, shall be subject to taxation, and that said statute as so construed was not invalid or repugnant to the Constitution of the United States and the Fourteenth Amendment thereof.

5. The Supreme Court of Oklahoma erred in holding and deciding that the entire fleet of cars had, within the meaning of the statute, an actual taxable situs in the State of Oklahoma, notwithstanding that the cars came into Oklahoma for the sole and only purpose of receiving a load of refinery products for transportation out of the state, and were only temporarily in the state for such purpose, and notwithstanding that none of the cars was kept, laid up, or stored in Oklahoma, but, except for short and unavoidable delays, all the cars were continuously in transit in interstate commerce.

6. The Supreme Court of Oklahoma erred in holding and deciding that appellant's entire fleet of cars was taxable in Pawnee County, Oklahoma, notwithstanding the fact that more than 300 cars of the fleet were, during the years for which the tax was imposed, continuously absent from the state (not the identical cars, but on an average), engaged in the marketing business of the appellant in other states, in which states the cars so engaged in business were taxed.

7. The Supreme Court of Oklahoma erred in holding and deciding that the appellant's entire fleet of railroad tank cars, employed and used by it in the transportation of refinery products out of Oklahoma to not less than 17 other states, for sale there, or in delivery to purchasers in such

[fol. 167] states, and in which states the cars habitually entering therein for such purposes were taxed, was nevertheless taxable in the state of Oklahoma as an entirety, and that such tax was not in violation of the Constitution of the United States, and did not contravene the Fourteenth Amendment thereto.

8. The Supreme Court of Oklahoma erred in refusing to hold and decide that appellant's fleet of cars, shown to have been constantly employed, and in movement, in interstate commerce during the years for which they were assessed, did not and could not thereby acquire an actual situs for taxation in the State of Oklahoma.

Prayer for Reversal

By reason whereof, and for which errors petitioner and appellant, Johnson Oil Refining Company, prays that the judgment and decision of the Supreme Court of Oklahoma be reversed and judgment rendered in favor of the said appellant, and for costs.

Chas. Y. Freeman, J. A. McCollum, Preston C. West, A. A. Davidson, Attorneys for Appellant, Johnson Oil Refining Company.

[fol. 168] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

No. 23219

[Title omitted]

ORDER ALLOWING APPEAL—Filed March 16, 1933

[fol. 169] The appellant in the above cause having prayed for the allowance of an appeal therein to the Supreme Court of the United States from the final judgment made and entered therein by the Supreme Court of Oklahoma on the 20th day of December, 1932 (petition for rehearing having been duly filed and thereafter denied on January 31, 1933), and from each and every part thereof, and having

presented and filed its petition for appeal, and its assignment of errors with prayer for reversal, and upon due consideration thereof and of the record in said cause:

It is ordered that said petition for appeal be, and is hereby, granted, and that an appeal from the judgment of the Supreme Court of Oklahoma in said cause be, and is hereby, allowed, to the Supreme Court of the United States, upon petitioner filing an appeal bond in the sum of one thousand dollars, with sufficient sureties, and conditioned that appellant shall prosecute its said appeal to effect, and answer all costs if it fails to make good its said plea.

It is further ordered that the Clerk of the Supreme Court of Oklahoma shall prepare and certify a transcript of the record, proceedings, and judgment, in said cause, and transmit the same to the Supreme Court of the United States.

The said appellant now presenting a bond in the sum of one thousand dollars, with United States Fidelity and Guaranty Company as surety, it is ordered, that the said bond be, and the same is hereby, approved.

In witness whereof, I have set my hand this 16th day of March, 1933.

Fletcher Riley, Chief Justice of the Supreme Court of Oklahoma.

Attest:

Gus Pool, Clerk Sup. Ct., by Reuel Haskell, Jr., Dep.

(Seal.)

[fols. 170–172] Bond on appeal for $1,000, approved and filed March 16, 1933, omitted in printing.

[fol. 173] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ACKNOWLEDGMENT OF SERVICE—Filed March 21, 1933

To the State of Oklahoma ex rel. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, and the Board of County Commissioners of the County of Pawnee, Oklahoma:

There is hereby served upon you, as appellees, by copies thereof, the petition for appeal by Johnson Oil Refining Company, the assignment of errors filed therewith, and the order allowing appeal, in the above entitled cause.

J. A. McCollum, C. C. McCollum, A. A. Davidson, Attorneys for Appellant.

Service of the foregoing is hereby acknowledged this 18th day of March, 1933.

W. T. Cleeton, County Attorney of Pawnee County, Oklahoma; Ed Waite Clark, Special Counsel, Attorneys for Appellees.

[File endorsement omitted.]

[fols. 174–188] Citation in usual form, showing service on W. T. Cleeton and E. W. Clark, filed March 16, 1933, omitted in printing.

[fol. 189] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23219

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of JOHNSON OIL REFINING COMPANY

PRÆCIPE FOR RECORD—Filed March 21, 1933

The Clerk of the Supreme Court of Oklahoma is hereby directed to prepare and certify a transcript of the record in the above entitled cause, for the use of the Supreme Court of the United States, by including therein the following:

1. Petition in error and case-made attached thereto as Exhibit "A".
2. Motion to consolidate the cause with causes 23,218, 23,334 and 23,342.
3. Order of consolidation.

4. Minute of submission.
5. Minute of judgment.
6. Majority opinion of the Supreme Court.
7. Petition for rehearing.
8. Order denying petition for rehearing.
9. Dissenting opinion of Justice Swindall on rehearing
10. Motion for stay of mandate and certificate of counsel.
11. Order staying mandate.
12. Petition for appeal.

[fol. 190] 13. Assignment of errors.

14. Order allowing appeal.
15. Bond on appeal.
16. Service of petition for appeal, assignment of errors and order allowing appeal.
17. Citation and service thereof.
18. Statement in support of jurisdiction under Rule 12 of the Supreme Court of the United States, and service thereof.
19. This præcipe.
20. Certificate of Clerk.

J. A. McCollum, C. C. McCollum, A. A. Davidson, Attorneys for Johnson Oil Refining Company.

Service of the foregoing is hereby acknowledged this 18th day of March, 1932.

W. T. Cleeton, County Attorney of Pawnee County, Oklahoma; Ed Waite Clark, Special Counsel, Attorneys for the State of Oklahoma ex Rel. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, and the Board of County Commissioners of the County of Pawnee, Oklahoma.

[fols. 191–206] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23219

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of JOHNSON OIL REFINING COMPANY

SUPPLEMENTAL PRÆCIPE FOR RECORD—Filed March 31, 1933

The Clerk of the Supreme Court of Oklahoma is hereby directed to include in the transcript of the record in the above entitled cause, in addition to the matters included in the original præcipe, the following:

Appellee's statement against jurisdiction under paragraph 3, rule 12 of the rules of the Supreme Court of the United States, and service thereof.

This præcipe.

J. A. McCollum, A. A. Davidson, Attorneys for Johnson Oil Refining Company.

Service of the foregoing is hereby acknowledged this 31 day of March, 1933.

W. T. Cleeton, County Attorney of Pawnee County, Oklahoma; Ed Waite Clark, Special Counsel, Attorneys for the State of Oklahoma ex Rel. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, and the Board of County Commissioners of the County of Pawnee, Oklahoma.

[fol. 207] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 208] IN SUPREME COURT OF THE UNITED STATES

APPELLANT'S DEFINITE STATEMENT OF THE POINTS UPON WHICH IT RELIES AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed April 7, 1933

[fol. 209] Statement of Points Relied On

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this Court in this cause are as follows:

Point 1. The statute of the State of Oklahoma, Section 9574 of the Compiled Statutes, 1921, providing,

"All property in this State, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation,"

as construed and applied by the Supreme Court of Oklahoma in its judgment and opinion, and so as to bring within its provisions, as to taxability, appellant's fleet of cars, is repugnant to the Constitution of the United States in that it contravenes the Fourteenth Amendment thereto as depriving appellant of its property without due process of law.

Point 2. As, upon the undisputed facts, appellant, an Illinois corporation, was at all times engaged, in the State of its domicile, in the business of marketing refined petroleum products in interstate commerce; that the cars assessed were an investment in, and a facility of such business; that they were at all times employed in commerce among the states; that they came to Oklahoma as an incident to such commerce, and were temporarily within the [fol. 210] borders of the state, for the sole purpose of receiving a load of refined petroleum products, principally at appellant's refinery in Pawnee County, Oklahoma, for transportation out of the state, and for delivery in other states, either to appellant's customers, or for sale at its own bulk stations maintained in a number of states; that each car was in the State of Oklahoma for such purpose, on an average, about two days per month; that more than four-fifths of the number of cars, on an average, were continuously out of the State of Oklahoma, employed in their owner's business in other states, and in which states they were taxed, and the taxes thereon were paid; and that as no part of the fleet of cars had ever been laid up or stored, the fleet of cars was not property within the jurisdiction of the State of Oklahoma for taxation purposes, and the assessment of the entire fleet contravened the Fourteenth Amendment to the Constitution of the United States, as claimed by appellant.

Point 3. The domicile of the owner, as an Illinois corporation, furnished, prima facie, the situs of its fleet of cars for the purpose of ad valorem taxation, and the fact that cars of the fleet came habitually to appellant's refinery in Pawnee County, Oklahoma, to be loaded with interstate merchandise for transportation out of the state, and for such purpose only, did not operate to change such situs, or authorize the taxing authorities in Oklahoma to assess a

tax thereon, and such tax contravenes the Fourteenth Amendment to the National Constitution.

[fol. 211] Point 4. The continuous movement of appellant's cars, both within and without the jurisdiction of Oklahoma, in interstate commerce, and for the transportation of refinery products from Oklahoma to, and for the distribution thereof in, other states, cannot operate to fix a situs for the entire fleet at the location of appellant's refinery, or at any other place, in the State of Oklahoma.

Point 5. The judgment of the Supreme Court of Oklahoma that the taxable situs of appellant's fleet of cars was at its refinery in Pawnee County, Oklahoma, is in conflict with the undisputed facts and the legal effect thereof, and with the fundamental basis of taxation, and the assessment of a tax thereon deprived appellant of its property without due process of law.

Point 6. The legal situs of the cars at the domicile of appellant, and in other states where they are employed and where they have been taxed, presumably in proportion to the protection afforded them by the laws of such states, precludes, upon established principles of taxation, the right of Oklahoma to levy a tax upon the entire assessable value of the entire fleet, in that the State is not called upon to protect, and cannot, upon the undisputed facts, afford the protection of its laws to, the entire fleet.

Point 7. The Supreme Court of Oklahoma committed reversible error in affirming the judgment of the County [fol. 212] Court of Pawnee County, Oklahoma, and in thereby denying the claims of appellant to the rights guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

Designation of Parts of Record to be Printed

The appellant states that it considers only the following parts of the record necessary for consideration of the points upon which it intends to rely:

Pages 1 to 10, both inclusive.
Pages 18 to 19, both inclusive.
Page 20.

Beginning with page 33, and continuing to the 5th line of page 42, ending with the words "That is all".

Beginning on page 45 with the words "G. C. Lilly (recalled)", and continuing to the 13th line of page 46, ending with the words "That is all".

Beginning on page 49 with the words "Direct Examination: Mr. Clark", to the 14th line of page 51, ending with the question and answer, "Q. And it is considered accurate? A. Yes."

Beginning with the 18th line on page 52 with the words "Cross Examination by Mr. Davidson", and continuing to page 53, including the first six lines on said page.

Beginning on page 57 with the words "G. C. Lilly being recalled, in open court deposes and says," and continuing to the bottom of page 83.

[fol. 213] All of pages 95 and 96.

Beginning with page 107, and continuing to and including page 116.

Print the remaining part of the record from pages 121 to 207, both inclusive.

Respectfully submitted.

Chas. Y. Freeman, J. A. McCollum, Preston C. West, A. A. Davidson, Attorneys for Appellant.

We hereby acknowledge service, by copy, of the foregoing and agree thereto this 31st day of March, 1933.

W. T. Cleeton, County Attorney of Pawnee County, Oklahoma; Ed Waite Clark, Special Counsel; J. Berry King, Attorney General of Oklahoma, by F. M. Dudley, Assistant Attorney General of Oklahoma, Attorneys for Appellees.

[fol. 214] [File endorsement omitted.]

Endorsed on cover: File No. 37,541. Oklahoma Supreme Court. Term No. 23. Johnson Oil Refining Company, Appellant, vs. The State of Oklahoma ex Rel. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, et al. Filed April 7, 1933. No. 23, O. T., 1933.